Supreme Court, U.S.
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In the
Supreme Court of the United States

ROSEMARY C. BUTCHER, et al.,
Petitioners,

v.

JOBST W.F. BLACHY, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Preface. The case involves 24 condominium units built on land not owned by the developer of the project. Broken down to individual units, each transaction involves: (1) a purchase agreement; (2) an agreement between the seller and a title insurer to furnish a title insurance commitment and a policy to the unit purchaser; and (3) an agreement between the title insurer and someone else to conduct the requisite search of the public record on behalf of the title insurer.

All three agreements were performed in each case. As to (1), it was discovered, years later, that the developer did not have title to the land on which the units were built. As to (2), Lawyers Title admits liability to its insureds, but refuses to pay their claims. As to (3), Lawyers Title has made no claim against its agent, who supposedly searched the public record more than 100 times. It seeks to recover its losses, resulting from his negligence, from persons not party to (1), (2), or (3).

The multiplicity of questions presented results from the fact that Lawyers Title is the real party in interest, but was unable to seek or obtain any relief from the lower courts in its own right. Lawyers Title is suing the wrong parties. It had a valid cause of action against the local title agency for misrepresentation to Lawyers Title of the agent's false claims that he had searched the public record whenever the agency issued a commitment or policy in Lawyers Title's name. Nobody could miss a deed 100 times.

Additionally, counsel for Lawyers Title successfully made some interpretations of statutes, court rules, and decided cases not found in any Hornbook, and, which may be issues of first impression in this court. That the property is in a

bankruptcy estate should not complicate one's analysis of the issues.

Questions

1. Does the bankruptcy estate of a Chapter 7 Bankruptcy Code debtor include the entire possessory estate of the debtor and her spouse in real property held by them as tenants by the entirety, as of the commencement of debtor's bankruptcy case, which may be exempted from debtor's bankruptcy estate, except as to joint claims, by debtor electing the "state-law" exemptions available under 11 U.S.C. § 22(b)(2)(B), or, does the Bankruptcy Code separate the couple's single entireties interest into moieties?

2. Is the Bankruptcy Code, enacted on November 6, 1978, as applied in this case, unconstitutional as affecting a taking of property, acquired by the entireties on July 12, 1978, without due process of law or for a public use without just compensation, contrary to the provisions of the Fifth Amendment to the United States Constitution?

3. Did the lower courts have subject matter jurisdiction to impose a constructive trust over an entireties estate interest where the named federal defendant was the Internal Revenue Service (IRS), where the plaintiffs below claimed priority over an existing government lien as the basis for federal court jurisdiction, but where plaintiffs had no valid title themselves at the time suit was begun?

4. Did the lower courts have subject matter jurisdiction over the original private defendants where the suit was removed from state court by the IRS, which is a nonsuable entity without statutory removal authority?

5. Did the suit, which sought a constructive trust over his interest in entireties property, become moot when debtor's husband released his interest in entireties property to debtor, as permitted by state law?

6. Did the death of debtor's husband extinguish plaintiff's constructive trust claims against his interest in property held by the entireties, thereby rendering the suit moot? (Rule 25(a)(1)).

7. Did the constructive trust action against the entireties interest of debtor's husband become moot for lack of a proper party defendant, when plaintiffs opened an estate for decedent and caused the personal representatives of his assetless estate to be substituted into the action for him after his death? (Rule 25(a)(1)).

8. Does Fed.R.Civ.P. 25(a)(1) authorize substitution of a claimed transferee of a deceased party into an action more than 7 years after his death?

9. Does Fed.R.Civ.P. 25(c) apply to a deceased party so as to permit the continuation of suit against him without complying with the substitution requirements of Fed.R.Civ.P. 25(a)(1)?

10. Did the constructive trust action against her husband's entireties interest become moot as to debtor upon the failure of plaintiffs to move for substitution of debtor, as the surviving entireties tenant, into the action within 90 days after suggestion of death was filed with the court?

11. Was the action against Rosemary time-barred where she acquired her interest as a tenant by the entireties on July

12, 1978, and, where process was first issued against her and served in February of 1999?

12. Was the action against Rosemary time-barred where she received a deed from her husband on October 30, 1991, but was not served with process until February of 1999?

13. Can a district judge amend and validate a final judgment, admittedly void as to an individual, by ordering the postjudgment issuance and service of process upon that individual, because he was unaware when entering the final judgment that no summons had been issued for or served upon her? (Rule 60(b)(1) and 60(b)(4)).

14. Can a district judge order a party joined in an action after entry of a final judgment, void as to her, to file a brief within 14 days after service "setting forth the reasons why a constructive trust should not be imposed over [her] interest in the property"?

15. Did the insured plaintiffs have standing to sue for constructive trust relief where the development corporations provided them with title policies required by the purchase agreements and as required by state law, without rescinding their purchase agreements, where the selling corporations proved to lack title?

PARTIES TO THE PROCEEDING

Petitioners

Robert E. Butcher and Rosemary C. Butcher, co-personal representatives of the estate of Alexander M. Butcher, deceased; Rosemary C. Butcher, an individual; Little Traverse Development Company, a Michigan Corporation, and H.C. Development Company, a Michigan Corporation. The corporate entities, Little Traverse Development Company and H.C. Development Company have no parent companies or nonwholly owned subsidiaries.

Respondents

Jobst W.F. Blachy; Lynn A. Blachy; Davida Gale; Peter E. Boss; Jeanette A. Boss; Kenneth W. Gitlin; Roslyn E. Gitlin; Joseph H. Jones; Barbara Ann Jones; T.F.C. Agency, Incorporated, a Michigan Corporation; George F. Malley; Barbara C. Malley; Richard A. Monash; Carol Monash; Charlotte R. Monash; E. Jerome McCarthy; Gunther S. Meisse; Jeanne R. Meisse; Irving Shanbom; Patricia Shanbom; Ronald W. Mitchell; Patricia W. Mitchell; Anthony J. D'Errico; Ann T. D'Errico; Northwestern Savings and Loan Association; Lawyers Title Insurance Corporation; Thomas G. Allshouse; Sheryle K. Allshouse; First Nationwide Bank; and, United States of America, on behalf of the Internal Revenue Service.

Respondent Lawyers Title Insurance Corporation is a principal subsidiary of a publicly owned corporation, LandAmerica Financial Group, Inc. No other respondent corporation has either a publicly owned parent or nonwholly owned subsidiary company.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 22 F.3d 896 (6th Cir. 2000). A copy of the Opinion is included in App. A at 1a.[1] The Opinion of the District Court for the Western District of Michigan, Southern Division dated March 10, 1999, is published at 35 F. Supp.2d 554 and is included in App. F at 43a. The District Court ordered entry of the final judgment on March 10, 1999, which is printed in App. E at 39a.

The District Court, on December 14, 1998, had previously entered an Opinion, printed in App. G at 56a and final order in App. H at 81a, before process was issued as to petitioner Rosemary C. Butcher. The district court's Order and Final Judgment dated March 10, 1999, reported at 35 F. Supp. 2d 554, amends the December 14, 1998 Order.

JURISDICTION

The United States Court of Appeals for the Sixth Circuit issued its Opinion on July 21, 2000. On August 12, 2000, Petitioners filed a Petition for Rehearing and Suggestion for Rehearing En Banc which the United States Court of Appeals denied on October 18, 2000. (App. I at 87a.) This Petition for Writ of Certiorari is filed within 90 days of the denial of the Petition for Rehearing. The Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254 (1) and 2106.

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[1] Citations to "App." are to the Appendix filed with this Petition for Writ of Certiorari, pursuant to Supreme Court Rule 14(i).

Reference to Statutory sections are to Title 11, the Bankruptcy Code, unless otherwise indicated.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., Amend. V
Takings Clause

No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

*****

Bankruptcy Code - Automatic Stay
11 U.S.C. § 362(a)

Section 362. Automatic stay

(a) Except as provided in subsection (b) of this section, a petition filed under § 301, 302, or 303 of this title, or an application filed under § 5 (a)(3) of the Securities Investor Protection Act of 1970, operates as a stay, applicable to all entities, of–

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

***

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

(4) any act to create, perfect, or enforce any lien against property of the estate;

(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;

*****

Bankruptcy Code - Property of the Estate
11 U.S.C. 541(a)(1) and (7)

Section 541. Property of the estate

(a) The commencement of a case under § 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

(1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable

interests of the debtor in property as of the commencement of the case.

. . .

(7) Any interest in property that the estate acquires after the commencement of the case.

*****

Bankruptcy Code - Exemptions
11 U.S.C. § 522(b)(2)(B)

(b) Notwithstanding § 541 of this title, an individual debtor may exempt from property of the estate the property listed in either paragraph (1) or, in the alternative, paragraph (2) of this subsection.

. . .

(B) any interest in property in which the debtor had, immediately before the commencement of the case, an interest as a tenant by the entirety or joint tenant to the extent that such interest as a tenant by the entirety or joint tenant is exempt from process under applicable nonbankruptcy law.

District Court Exclusive Jurisdiction
28 U.S.C. § 1334(e)

"(e) The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction of all of the property,

wherever located, of the debtor as of the commencement of such case, and of property of the estate."

*****

Federal Officers or Agencies
Removal of Cases from State Courts
28 U.S.C. 1442 (a)(1)

(a) A civil action or criminal prosecution commenced in a State court against any of the following may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:

(1) The United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agency thereof, sued in an official or individual capacity for any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.

*****

Federal Substitution of Parties Rule
Fed. R. Civ. P. 25

(a) Death.

(1) If a party dies and the claim is not thereby extinguished, the court may order substitution of the proper parties. The motion for substitution may be made by any party or by the successors or representatives of the deceased party and, together with the notice of hearing, shall be served on the parties as provided in Rule 5 and upon persons not parties in the manner provided in Rule 4 for the service of a summons, and may be served in any judicial district. Unless the motion for substitution is made not later than 90 days after the death is suggested upon the record by service of a statement of the fact of the death as provided herein for the service of the motion, the action shall be dismissed as to the deceased party.

(c) **Transfer of Interest.** In case of any transfer of interest, the action may be continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party. Service of the motion shall be made as provided in subdivision (a) of this rule.

*****

Federal Relief from Judgment or Order Rule Fed.R. Civ. P. 60(b)(1) and (4)

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud,

Etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; * * *

(4) the judgment is void; * * * The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation.

*****

Michigan Termination of Tenancy by Entirety Act
MCL 557.101,557.102

Section 1. In all cases where husband and wife own any interest in land as tenants by the entirety, such tenancy by the entirety may be terminated by a conveyance from either one to the other of his or her interest in the land so held.

Section 2. This act shall be deemed to be declaratory of the common law as heretofore existing in this state.

*****

Michigan Condominium Act
MCL 559.194 - Title Insurance

Section 94. The developer shall furnish a purchaser buying a condominium unit from the developer a title insurance policy, in the amount of the purchase price, by a title insurance company licensed to do business in the state.

STATEMENT OF THE CASE

The basic issues are federal court jurisdiction, and, whether all property held by a couple by the entireties goes into the debtor's bankruptcy estate where one spouse files a Chapter 7 petition (liquidation), lists the entire property as part of her bankruptcy estate, and claims all of the entireties property exempt (except as to allowed joint claims) from her bankruptcy estate, by electing the "state-law" exemptions authorized by Section 522(b)(2)(B), or, whether the filing by one spouse separates the interest of the couple into moieties. The 6th Circuit Court of Appeals has held in this case (App. A at 19a) (1) that the filing of a Chapter 7 petition by one spouse separates the single entireties tenancy interest held by the couple as of the commencement of the case and creates new and separate moiety interests in the 2 entireties tenants (App. A at 19a) in the property owned by them by the entireties: (2) that there is "no doubt" that the petitioner's interest (presumably one-half) went into her bankruptcy estate; but, (3) that her husband's interest did not become part of her bankruptcy estate. (App. A at 22a). Then, it held that neither the postpetition conveyance by the husband to the debtor wife of his interest in the entireties property, nor his death, effected a "merger" in debtor of the new separate interests created, postpetition, under its ruling, by the filing of the Chapter 7 petition. (App. A at 21a).

The effect of the 6th Circuit's ruling is: **first**, the panel says that one entireties tenant can, by filing a bankruptcy petition, divide the entireties tenancy into moieties, which is contrary to all entireties law; **second**, it holds that the interest of the electing debtor spouse in the entireties property is exempt from debtor's bankruptcy estate, while the interest of the nondebtor spouse becomes subject to execution by his claimed creditors, because it does not go into the debtor's

bankruptcy estate; **third**, it holds that the filing destroys both spouses' individual rights of survivorship in the whole property, regardless of whichever spouse files, or, whichever survives the other; and, **fourth**, the amount of property available to satisfy allowed joint claims in the bankruptcy proceeding is reduced by the amount of property obtained by individual creditors who prevail on a constructive trust theory in another court against a debtor's spouse. The panel treats these newly created and separated entireties property interests exactly as if the property were held in a joint tenancy as of the commencement of the case. It ignores § 541(a)(2) of the Code, which include all interests of the debtor and debtor's spouse in community property into debtor's bankruptcy estate.

Alexander and Rosemary Butcher, husband and wife, acquired the 17.83 acres of land at issue on July 12, 1978. The deed to them was recorded on July 14, 1978. The Butchers had previously transferred a 36.65 acre parcel to Little Traverse Development Co. ("LTDC"), a Michigan corporation owned solely by Alexander Butcher, (Alexander). The deed dated July 12, 1978, was a transfer back to the Butchers of 17.83 acres, out of those 36.65 acres.

LTDC set out to develop the **18.82** acres which it had retained, as part of phase II of the project, by building new condominiums thereon. Lawyers Title Insurance Corporation (Lawyers Title) insured LTDC's title to the 18.82 acres, as well as the titles to the condominiums when developed and sold, without incident. Lawyers Title did not insure the July 12th conveyance, but was obviously aware that the 17.83 acres were not then being developed.

There was no error in 1978, contrary to the panel's holding. (App. A at 4a.) The first title examination error apparently occurred on April 29, 1981, when Lawyers Title

issued its commitment no. 4478 to insure the construction loan on the units in question. (App. L at 94a). The commitment referred back to a mortgage dated July 13, 1978, on which date LTDC was in fact the owner of record of the 17.83 acres. (App. M at 95a). Respondents offer no explanation as to how Lawyers Title could, in 1981, search the record back to July 13 and miss the deed from LTDC which was recorded on July 14, 1978.

After receiving that loan, LTDC built fifteen new condominium units on the 17.83 acres, still titled in the names of the Butchers, to complete phase II. The first deed to any insured plaintiffs appears to be dated October 22, 1981. Alexander Butcher formed H.C. Development Co. ("HCDC") in 1984 and HCDC developed 9 condominium units, also on the 17.83 acres, as part of phase III. LTDC and HCDC apparently mistakenly believed they held title to the real property on which these 24 units were built. Rosemary Butcher (Rosemary) was never a shareholder in either LTDC or HCDC. Lawyers Title insured title to all or most of the 24 units built on the 17.83 acres, guaranteeing to the unit purchasers the titles received from LTDC or HCDC.

MCL 559.194 requires condominium developers to furnish purchasers from the developer with a policy of title insurance in the amount of the purchase price. Over the years, for a fee, Lawyers Title probably issued 100 or more title commitments and/or policies, each of which indicated that title to the involved unit was in LTDC and/or HCDC, rather than in the Butchers'. Lawyers Title, or its agent, missed the July 14, 1978 deed in 100 or more public record searches in issuing its titlework, because it only searches back to the last policy which it issued on a property, a procedure which guarantees that it will not detect its own prior mistakes.

Alexander was diagnosed with terminal cancer in approximately February of 1991. He died on December 26, 1991. Rosemary filed a Chapter 7 petition in bankruptcy on March 1, 1991. In mid-1991, in an unrelated sequence of events, Lawyers Title was apprised by a new title agency of its multiple title commitment and title policy errors committed over the 10-year period. Lawyers Title and its insureds filed an adversary proceeding in Rosemary's bankruptcy proceeding, falsely claiming to be secured creditors of Rosemary, and falsely claiming that Lawyers Title was somehow misled.

Lawyers Title, in its own name and on behalf of its insureds, brought this suit in state court against LTDC, HCDC, and Alexander Butcher, individually, on October 16, 1991, seeking the alternate relief of a constructive trust or damages. The suit was removed (App. J at 89a) to the district court by the Internal Revenue Service (IRS), which is a nonsuable entity without removal power under either 28 U.S.C. § 1441 or § 1442. Alexander, unable to participate in extended legal proceedings, released his entireties interest in the property to his spouse, by quitclaim deed dated October 30, 1991, as permitted by MCL 557.101. An amended Complaint adding or substituting Rosemary as a defendant was filed on November 10, 1998, seven years later. Alexander was substituted out of the case on February 11, 1994. (App. K at 9[illegible]a.)

A final judgment was entered by the district judge on December 14, 1998 (App. H at 81a), declaring Alexander and Rosemary, neither of whom was then a party to the action, to be constructive trustees. No summons had been issued for or served upon Rosemary in the case. A summons for her was first issued on February 5, 1999, 20 ½ years after she

acquired her entireties interest in the property, and, 7 1/4 years after suit was instituted.

Rosemary filed a motion for relief from the December 14, 1998 final order, as being void as to her, for lack of personal jurisdiction, citing Fed.R.Civ.P. 60(b)(4). The district judge twice conceded (App. D at 37a and App. F at 43a) that he lacked the requisite personal jurisdiction. On February 1, 1999, he denied the motion for Rule 60(b)(4) relief, and ordered that a summons in Rosemary's name be issued and served, and that, upon being served, she file a brief within 14 days as to "why a constructive trust should not be imposed over [her] interest in the property (App. D at 38a), even though the relief sought was imposition of a constructive trust against Alexander's interest.

By Opinion and Final Judgment dated March 10, 1999, the district judge "amended" the void order of December 14, 1998 to delete Alexander as a constructive trustee and to limit the constructive trust "to Rosemary's interest in the property not included in her bankruptcy estate." (App. F at 53a and App. E at 41a).

The 6th Circuit affirmed the district court's rulings as to the private defendants, holding that Fed. R.Civ. P. 60(b)(1) authorizes a court to amend and validate a void order where the court is mistaken as to whether a named party has been served with process. It did not address the Rule 60(b)(4) issue. Lawyers Title claimed and obtained no relief in its own name. The suit was brought because the respondents were not joint creditors of Rosemary and Alexander. They could not recover anything in the bankruptcy proceeding, and so attempt to separate the entireties interest of Alexander and Rosemary. Petitioners argued that the insured respondents have no standing because each of them obtained a title policy, and,

each of them elected to avail himself of the policy benefits, rather than to rescind their agreements. The insureds were not and could not be injured.

ARGUMENT FOR GRANTING WRIT

Petitioners urge the court to grant this petition for Writ of Certiorari for the following reasons.

Argument 1. The 6th Circuit panel erred in holding that a filing under the Bankruptcy Code separates the single interest of tenants by the entireties in real property, where state-law exemptions are claimed by the debtor. This case involves interpretation of the bankruptcy estate inclusion (Section 541) and exemption (Section 522) provisions of the Bankruptcy Code (Title 11) as to real property held by a Michigan couple as tenants by the entireties where the wife filed a Chapter 7 Petition (liquidation). 11 U.S.C. § 541 (a)(1) and (a)(7) provide:

> "(a) The commencement of a case under section 301,302 or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:
>
> (1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case."
>
> (7) Any interest in property that the estate acquires after the commencement of the case.

The 6th Circuit most recently reviewed Michigan law relative to property held by the entireties in *Craft v. United States*, 140 F.3d 638 (6th Cir. 1998), citing excerpts from the

opinion in *Sanford v. Bertrau*, 204 Mich. 244 (1918), which read:

> **Page 247:** "The subject of estates by the entirety has been considered in many aspects by this court * * *
>
> In speaking of the estate this court said it was an entirety.
>
> They both took the same estate, the same interest, and it could not be separated. The right of the one was the right of the other. Neither could by a separate transfer affect the fights of the other, or his own. What would defeat the interest of one would also defeat that of the other."

In Re Appeal of Nellie Lewis, * * * this court said:

> "The estate created by this deed was not an estate in joint tenancy, but an estate in entirety. A joint tenancy implies *a seisin per my et per tout,* while an estate in entirety implies only a *seisin per tout."*
>
> **Page 248:** "It is urged by counsel for plaintiffs and appellants that, before the death of either of the parties, each holds an estate similar in some respects to that of a contingent remainder, and that it has been held that a contingent remainder is not subject to execution. We think the better doctrine is that the right of survivorship is merely an incident of an estate by entirety, and does not constitute a remainder, either vested or contingent."
>
> **Page 250:** "By a fiction of the common law, the husband and wife were regarded as one person; the legal existence of the wife being suspended during coverture, or at least incorporated and consolidated

into that of the husband. Blackstone's Comm., book, p. 442. Upon this legal fiction of the unity of husband and wife rests all of the distinctions and peculiarities which distinguish the estate by entireties from other joint estates. * * *

By reason of the common law fiction heretofore mentioned, the husband and wife, being one person in law, were each incapable of holding any separate interest in an estate so acquired. * * *

An estate in joint tenancy may be severed or destroyed by the act of one of the tenants, so as to defeat the right of survivorship of the other joint tenant; but a tenant by the entireties cannot during coverture, by deed, mortgage, devise, or other act of his own, **defeat the right of the** surviving husband **or wife to hold the entire** estate. * * * (Emphasis supplied)

Page 252: "The reason that it [an entireties estate] cannot be sold in satisfaction of a judgment rendered against either of the tenants alone is apparent from the inherent nature of the estate. Neither owns any severable interest therein."

In *Dickey v. Converse*, 117 Mich. 449, 455 (1898), the court stated:

> "This species of tenancy grows out of the unity of husband and wife, and is unlike that of joint tenants, who are each seised of an undivided moiety. The husband and wife are each seised of the whole, and not of undivided moieties." (Emphasis supplied).

At page 454, the *Dickey* court stated:

> "In *Arena Ins. Co. v. Resh*, 40 Mich. 241, it was held that where husband and wife were in a possession of a house granted to them by the

> same deed, the husband "was neither a tenant in common nor an ordinary joint tenant. His estate in case of his death went by survivorship to his wife, and during their lives, **whatever his right may have been, it was not an undivided half of the property.**" . . . (Emphasis supplied).

Thus, "as of the commencement of the case", the Michigan debtor and spouse have a single interest, the same interest, in entireties real property; they are each "seised of the whole, and not of undivided moieties"; and, neither, by his own act, can "defeat the right of the [survivor] to hold the entire estate." Neither has a separate or separable interest or estate in the property.

Accordingly, whenever one entireties tenant files a Chapter 7 petition, the "whole" property goes into the debtors bankruptcy estate, and, when the debtor elects the state-law exemption provided in Sec. 522(b)(2)(B), the whole entireties interest is exempted from debtor's estate, except as to joint claims against the couple. The whole property can be exempted because debtor was seised of the whole as of the commencement of the case. The whole interest can be exempted after the interest goes into debtor's bankruptcy estate. *Owen v. Owen*, 111 S.Ct. 1833, 1835 (1991).

The district judge (App. G at 68a) and the 6th Circuit Panel (App. A at 20a) held that Alexander's interest was not part of Rosemary's bankruptcy estate because the deed to her was given more than six months after her filing date, but those holdings assume that there was a separation of the single interest of the couple before the deed was delivered, and, it conflicts with the holding of both lower courts (App. A at 20a

and App. G at 66a) that the couple's entireties tenancy terminated upon delivery of the deed on October 30, 1991.

Whenever a Michigan couple does not have exactly the same entireties interest, there is no longer a tenancy by the entireties in the property interest separately held. Neither could transfer any part of the whole to another without the consent of the other *Craft*, *Bertreau*, *supra*. An entireties tenant can, by his sole act, release his entireties interest to his spouse. MCL 5557.101. The release of one's interest is not the same thing as a transfer of that interest.

A debtor's bankruptcy estate includes the debtor's proportionate interest in property held in a joint tenancy, § 541(a)(1); the interests of the debtor and the debtor's spouse in the specified community property, § 541(a)(2); and, the entirety in property held by the entireties. There is only one entireties interest "as of the commencement" of the case. The panel' s proposition (App. A at 19a) that "By recognizing an interest in entireties property that is part of a bankruptcy estate", that there is a corresponding separate interest which divides and destroys the entireties estate is simply not tenable.

Section 522(b)(2)(B) provides in pertinent part:

> (b) Notwithstanding section 541 of this title, an individual debtor may exempt from property of the estate the property listed in either paragraph (1) or, in the alternative, paragraph (2) of this subsection.
>
> (2)
>
> ***
>
> (B) any interest in property in which the debtor had, immediately before the commencement of the case, an interest as a tenant by the entirety or joint tenant to the extent that such interest as a tenant by the

entirety or joint tenant is exempt from process under applicable nonbankruptcy law."

The 6th circuit panel (App. A at 20a) brushed aside petitioner's reliance on *Craft v. United States*, (no separate present or separable future interest - pp. 643, 644 of 140 F.3rd) holding it distinguishable "because the property at issue was not part of a bankruptcy estate." Of course, under respondent's theory, the property at issue here, Alexander's interest, was also **not** part of a bankruptcy estate, as the panel itself held (App. A at 20a), so why does *Craft* not apply? Section 522 does not purport to split the entireties interests of the couple or limit the exemption. Whatever was exempt from process under state law is exempt from process after the debtor elects the subsection (B) state-law exemptions. If the nondebtor spouse dies during administration his or her interest goes into debtor's estate. Section 541 (a)(7), but becomes exempt from individual claims.

The panel (App. A at 18a-19a) relied on the court's holding in *Arango v. Third National Bank* (*In Re Arango*), 992 F.2d 611,614 (6th Cir. 1993), an impairment of lien case. There is no suggestion in *Arango* that the couple's entireties tenancy was terminated by the filing; or, that Mrs. Arango's creditors could now go against her interest in the entireties property; or, that Mr. Arango's right of survivorship in his nondebtor spouse's interest was destroyed by his filing. Mr. Arango's survivorship interest was held to be nonexempt because he owned that interest, as if it were a contingent remainder, and could transfer it without his wife's consent. Unlike in Michigan, survivorship interest, under Tennessee law, is not owned by the couple as an incident of their tenancy by the entireties.

There is, by definition, no such thing as a separate or separable interest in property held by a person as a tenant by the entirety. Section 522 exempts the entirety from the claims of individual creditors, not half of the entirety.

The panel misread the court's own prior opinion in *Arango*, which held that the debtor's right of survivorship **was** part of his bankruptcy estate, 992 F.2d, page 614, but was **not exempt**, page 615, an obviously correct holding. Petitioners have argued for nine years that Rosemary's right of survivorship **is** in her bankruptcy estate, but **is exempt** because she could not convey it to a third party without her husband's consent during coverture.

Under *Arango*, if debtor predeceases his wife, the holder of the lien on his survivorship right in the entireties property would take nothing. If the wife dies first, it can enforce its lien. The significance of *Arango* is that the debtor's Chapter 7 filing did not destroy the survivorship right of either spouse.

The panel in this case holds that Rosemary's interest in the entireties property goes into her bankruptcy estate, but that neither she nor her estate had a survivorship interest or the right to receive Alexander's interest. The panel affirmed the imposition of a constructive trust over Rosemary's nonbankruptcy interest in the property (App. A at 10a).

To be consistent with *Arango*, the court should have imposed a constructive trust over Alexander's interest, which could be enforced only if Alexander survived Rosemary.

Argument 2. The District Court had no discretion or authority to amend its order of December 14, 1998, which was void as to Rosemary; only a **valid order may be**

amended. The district judge's final order of December 14, 1998 (App. H at 82a) reads, in part, as follows:

> **IT IS FURTHER ORDERED AND ADJUDGED** that Alexander M. Butcher and Rosemary C. Butcher held title to the real property as constructive trustees for the benefit of Little Traverse Development Co., Harbor Cove Development Co., and . . .

On December 14, 1998, neither Alexander nor Rosemary was a party to the suit. Alexander had been substituted out of the suit on February 11, 1994. (App. K at 93a.) He owned no interest in the entireties property after October 30, 1991. On December 14, 1998, Rosemary, in her individual capacity, had not been served with either a summons or a copy of the First Amended Complaint. The order of December 14, 1978 was void as to both Alexander and Rosemary.

The question presented is whether, **after entry of the void order of December 14, 1998,** the court could validate such order by summoning Rosemary and requiring her to persuade the court why a constructive trust should not be imposed upon her property. By his actions, the judge became a party to the suit.

Petitioners brought a motion for reconsideration of the order of December 14, 1998, asserting that the order was void as to Rosemary, for lack of personal jurisdiction. Judge Quist agreed with this assessment, stating in his order dated February 1, 1999 (App. D at 37a):

> "The Butcher Defendants contend that the Court's Order erroneously imposed a constructive trust over Rosemary because she had not been served with a summons and copy

> of the amended complaint and therefore was not subject to the Court's jurisdiction at the time the December 14, 1998, Order was entered. Based upon its review of the file, the Court noted that at the time the Order was entered, Rosemary had not been served with a summons and copy of the amended complaint"

In his opinion dated March 10, 1999 (App. F at 44a), Judge Quist stated:

> "In their motion for reconsideration, the Butcher Defendants argue that the Court's December 14, 1998, Opinion and Order were not binding on Rosemary because she was not yet a defendant in this action, and, therefore, the Court was without personal jurisdiction over her. The **Court agreed** and issued its February 1, 1999, Order for service" (Emphasis supplied)

Judge Quist's own rulings held that his order of December 14, 1998 was void as to Rosemary. The point is just that any determination by a court that its order is void prevents further action. The declarant court has no power to vitalize or resurrect the void order. The district court should have given Rosemary relief from the final order.

Fed.R.Civ.P. 60(b) expressly provides that a motion for relief from a void Judgment "does not affect the finality of a judgment or suspend its operation." Plaintiffs below viewed the motion as a Rule 60(b)(4) motion, saying:

> "Plaintiffs are aware of L.R. 7.4(b), which does not provide for a response to a motion for reconsideration. Despite its label, however, the motion seeks relief from a judgment pursuant to Fed.R.Civ.P. 60(b)(4)."

Having found that it lacked personal jurisdiction over Rosemary on December 14, 1998, the Court must relieve her from the provisions of the judgment. In *Wright & Miller, Federal Civil Procedure*, § 2862, void judgment, at page 322, it is stated:

> Rule 60(b)(4) authorizes relief from void judgments. Necessarily a motion under this part of the rule differs markedly from motions under the other clauses of Rule 60(b). There is no question of discretion on the part of the court when a motion is under Rule 60(b)(4). Nor is there any requirement, as there usually is when default Judgments are attacked under Rule 60(b), that the moving party show that he has a meritorious defense.
>
> Either a judgment is void or it is valid. Determining which it is may well present a difficult question, but when that question is resolved, the court must act accordingly.
>
> ***
>
> A judgment is not void merely because it is erroneous. It is void only if the court that rendered it lacked jurisdiction of the subject matter, **or of the parties,** or, if it acted in a manner inconsistent with due process of law.

In *Jordon v. Gilligan*, 500 F.2d 701 (1974) (6th Cir.), Syllabi 1 and 13 state:

1. "A void judgment is a legal nullity and a court considering a motion to vacate has no discretion in determining whether it should be set aside."

13. A void judgment is no judgment at all and is without legal effect.

See also, 12 James Wm. Moore et al., *Moore's Federal Practice*, § 60.44 [5] [a]. It was an abuse of discretion for Judge Quist to try to give life to the suit against Rosemary. No summons for her had even been issued prior to February 5, 1999.

The district judge (App. F at 45a) claimed authority to validate the December 14th order under Fed.R.Civ.P. 59, which rule had no application because Rosemary was not a party on December 14th. The 6th Circuit panel (App. A at 27a) held that the district judge obtained jurisdiction when, two months later, in February of 1999, the writer accepted service of process on behalf of Rosemary, and, that the court then had authority to amend the December 14, 1998 final order based on the court's mistaken belief that Rosemary had been served, citing Rule 60(b)(1). The panel did not discuss the effect of Rule 60(b)(4).

Rule 60(b)(1) does not permit a court to amend a void judgment. The 9th circuit case cited by the panel did not involve a void judgment. Rule 60(b) allows a court to relieve a party from a final judgment. In *Murphy Bros. v. Michetti Pipe Stringing, Inc.*, 119 S.Ct. 1322 (1999), this court said:

> "Accordingly, one becomes a party officially, and is required to take action in that capacity, only upon service of a summons or other authority-asserting measure stating the time within which the party served must appear and defend. See Fed. Rule Civ. Proc. 4(a) . . . **Unless a named defendant agrees to waive service, the summons continues to function as the *sine qua non* directing an individual or entity to participate in a civil action or forgo procedural or substantive rights.**" (Emphasis supplied)

There was no waiver of service. No summons had ever been issued as of December 14, 1998.

Argument 3. The Bankruptcy Code, as applied, violates the Fifth Amendment to the United States Constitution in that, as applied, it separates the single interest of tenants by the entirety into two interests and, destroys the survivorship rights of both entireties tenants, as to property interests created before enactment of the Code. The subject property was acquired by Alexander and Rosemary on July 12, 1978. The Bankruptcy Code was enacted on November 6, 1978, to be effective in 1979. Two immutable features of tenancies by the entireties are: (1) that the tenancy can be held only by husband and wife, and; (2) neither tenant can by his or her sole act alien in any way the interest of the other.

The lower courts have held (App. A at 20a-21a) that Rosemary's filing under the Code separated the single entireties interest of the couple held by them since before enactment of the code and destroyed both tenants right of survivorship, and, (App. A at 17a), in addition, that Alexander's release of his interest to Rosemary by deed dated October 30, 1991, destroyed both her right to receive that very interest from him and her right of survivorship in the entirety, should she survive Alexander.

Under prior bankruptcy law, entireties property was not included as part of a debtor's bankruptcy estate. Legislation acts prospectively. In *United States v. Security Industrial Bank*, 103 S.Ct. 407, 408 (1982), this Court held:

> "No bankruptcy law shall be construed to eliminate property rights that existed before the law was enacted in the absence of an explicit command from Congress. In light of

> this principle, in the absence of a clear expression of Congress' intent to apply Section 522(f)(2) to property rights established before the enactment date, the statute will not be construed in a manner that could call upon this Court to resolve difficult and sensitive questions arising out of the guarantees of the Takings Clause."

The Code, as applied by the panel, could not affect entireties estates created prior to its enactment in the manner held by the panel.

The Court of Appeals (App. A at 20a) held that the entireties tenancy held by Alexander and Rosemary since July 12, 1978, terminated on October 30, 1991, when Alexander quit-claimed his interest to Rosemary. MCL 557.101 and 557.102 provide:

> **557.101. Tenancy by entirety; termination**
> Section 1. In all cases where husband and wife own any interest in land as tenants by the entirety, such tenancy by the entirety may be terminated by a conveyance from either one to the other of his or her interest in the land so held.
> **557.102. Act declaratory of common law**
> Section 2. This act shall be deemed to be declaratory of the common law as heretofore existing in this state.

Under Michigan law, if Alexander had died at any time after July 12, 1978 and before October 30, 1991, or, if Alexander had conveyed his entireties interest to Rosemary during that period, Rosemary would have become vested with the whole interest in the real property, because Alexander held a right of survivorship as one of the entireties tenants,

and, vice versa. In *Hearns v. Hearns*, 333 Mich. 423,432 & 433 (1952), the court stated:

> "As noted, the property was owned by plaintiff and defendant as tenants by the entireties. That the husband might have released his interest to the wife, **thereby vesting her with full and complete title**, is not open to question. *See Ash v. Ash*, 280 Mich 198, and prior decisions therein cited. CL 1948, § 557.101 (Stat Ann Sec. 26.201)." (Emphasis supplied).
>
> *Hearns* also applies where the conveyance is from the wife to the husband.

In *Muskegeon Lumber and Fuel Company v. Johnson*, 338 Mich 655, 660 (1954), the court stated:

> "**The interest of a wife in an estate by entireties is her separate property which she may hold free of her husband's debts.** One of the incidents of the estate is the power to sell it with her husband's consent. It is for this reason, the denial of her right of alienation, which makes invalid during their joint lives any deed or mortgage executed by the husband alone, and it is for this reason that a judgment against the husband is ineffective. * * * (Emphasis supplied). *See also* excerpts from the opinion in *Sanford v. Bertrau*, *supra*.

The 6th Circuit panel held that Rosemary did not acquire full and complete title for herself, either when she received the deed of October 30, 1991, or, when Alexander died on December 26, 1991, even though the panel had "no doubt" (App. A at 17a) that Rosemary's right of survivorship became part of her bankruptcy estate upon filing, and, even

though it agreed that she acquired Alexander's interest, by the deed of October 30, 1991 (App. A at 20a), which release terminated the tenancy.

The panel has thus held that, despite the courts' holdings in *Sanford v. Bertrau*, and *Craft v. United States.*, and, despite the provisions of MCL 557.101, one entireties tenant can alien the interest of the other by filing for bankruptcy or by conveying his interest to the other, to the benefit of the grantor tenant's creditors. It is simply not possible under Michigan law for one entireties tenant to alien any of the rights of the other in the property, by his or her sole act. It is absurd to claim or hold that an interspousal conveyance, expressly authorized by law for decades, redounds to the benefit of the grantor's claimed creditors, rather than to the benefit of the grantee.

Just as Alexander could not, before enactment of the Bankruptcy Code, by his sole action of deeding his interest to Rosemary, alien in any way or degree Rosemary's right of survivorship in the whole property, Rosemary could not, by her sole action in filing her bankruptcy petition, alien in any way or degree Alexander's right of survivorship. An entireties tenant can terminate his or her interest in entireties property by dying or by deeding over his interest to his spouse, but, the filing of a bankruptcy petition coupled with election by the debtor spouse of the state-law exemptions allowed in 11 U.S.C. § 522(b)(2)(B), cannot rationally be viewed as an intention to alien the entireties interest of either spouse in the entireties property.

Even if the 6th Circuit panel could somehow be correct in its reading of the Code, that interpretation cannot be applied to destroy rights in entireties estates created before the Code's enactment.

Argument 4. The interspousal deed of October 30, 1991 did not effect a transfer of interest to Rosemary. The Court of Appeals (App. A at 4a) states as fact that on July 12, 1978:

> "Alexander signed a warranty deed in his capacity as president of LTDC, conveying the unmortgaged portion of the property, consisting of 17.83 acres, back to the Butchers as tenants by the entirety. This deed was recorded on July 14, 1978."

It then (App. A at 16a) reversed the district court and gave priority to the IRS "tax lien against the Butchers' property", over the claims of plaintiffs below. At Appendix A at page 20a, the panel held the court's prior holding in *Craft v. United States* distinguishable "because the property at issue [In *Craft*] was not part of a bankruptcy estate." On the same page, the panel held that the interest conveyed by Alexander, like the interest in *Craft*, was also **not part** of a bankruptcy estate, and then failed to explain why **Craft** did not control this property since the court expressly found that neither property interest was part ora bankruptcy estate. It should have held that Alexander had no separate interest which could be reached by his claimed creditors.

The panel also found that the October 30, 1991 deed "terminated the tenancy by the entirety . . . ", citing MCL § 557.101, *supra*. Any such interspousal deed during the tenancy is a release of interest, not a transfer of interest. *Heams v. Heams*, 333 Mich. 423,432, 433 (1952), *supra*.

In *In Re Renz' Estate*, 338 Mich 347, 356 (1953), the court approved this statement.

> "As estates by the entirety and joint estates with full right to the survivor are based on the theory that upon the death of one of the joint tenants the joint property becomes the property of the survivor not by descent, distribution or transfer but by right of survivorship therefore there would be no tax on the joint estate because there is no transfer.

A release of a spouse's interest in entireties property, prior to termination of the tenancy, does not effect a transfer of property. The interest of one entireties tenant cannot be transferred. Delivery of a quitclaim deed to one's spouse most nearly resembles a disclaimer. The grantee spouse already owns the entirety, as does the grantor, but either spouse can give up his or her interest to the other. An interest in property held by the entireties does not go into the probate estate of the first spouse to die. The interest of the grantor spouse simply ceases to exist, leaving the underlying property outside the reach of persons claiming through the grantor spouse. Death or a release to the other spouse necessarily terminates the entireties estate because only one person thereafter has an interest in the property.

Similarly, the claims of creditors of the first spouse to die are extinguished upon death, within the meaning of Rule 25(a)(1), because that spouse's creditors never had a claim against the survivorship right of the surviving spouse.

Argument 5. The suit became moot as to Rosemary when a Motion to Substitute her into the action was not made within 90 days after a suggestion of Alexander's death was filed on January 2, 1992. Rule 25(a)(1). The complaint seeks imposition of a constructive trust over Alexander's "interest, if any" in the 17.83 acres at issue. The

lower courts say that he had an interest at the time suit was begun, but they are unable or unwilling to define the nature or extent of that interest.

The 6th Circuit panel says that the couple had separate interests. (App. A at 20a). The *Arango* panel held (¶ 614 of 992 Fed.2d) that debtor and his wife each held separately owned rights of survivorship and separate "present possessory" interests postpetition. The lower courts say that Alexander transferred his interest to Rosemary after suit was filed. (App. A at 28a.) So, what was the point in substituting the personal representatives into the suit for Alexander in February of 1994 (App. K at 92a) instead of Rosemary?

The lower courts have made a shambles out of Fed.R.Civ.P. 25 in continuing this suit. Everybody agrees that the October 30, 1991 deed to Rosemary was valid, and that it terminated the entireties tenancy. If the action against Alexander's interest was not extinguished by his death on December 26, 1991, Rule 25(a)(1), the only proper party against whom to continue the action was Rosemary, the claimed transferee of Alexander's interest. The interest of the first tenant to die does not go into the decedent's probate estate, so it was pointless to substitute personal representatives of an assetless estate to "represent the interests of Alexander . . . . " (App. K at 93a.) The action against Alexander became moot.

A suggestion of Alexander's death was filed in the district court on January 2, 1992. If the claim against his interest was not extinguished by his death, plaintiffs below had 90 days thereafter within which to make a motion to substitute Rosemary, the only person who could be a proper party. Both lower courts have held that Alexanders' interest was not in Rosemary's bankruptcy estate (App. at 17a) so

there was no reason why she could not or should not have been substituted into the suit in early 1992.

Rosemary was first named as a party to the action in the First Amended Complaint which was filed on November 10, 1998, almost 7 years after the suggestion of death was filed. She was first served with process, which was issued on February 5, 1999, later in that month. The panel (App. A at 28a) held that the substitution of Rosemary into the case in 1999 "was appropriate."

To confuse their rulings even further, both lower courts held (App. A at 28a) that Rule 25(c) applies to permit substitution for a deceased party without time limitation, which holding negates and obviates the 90-day provisions of Rule 25(a)(1). The *Luxliner* case relied upon by the panel (App. A at 28a) did not involve a deceased party, nor did it hold that Rule 25(c) authorized substitution for a deceased party.

It was simply not possible to continue a suit against a deceased party into 1999 "because the plaintiffs' claim is a continuation of their claim against Alexander . . . ." (App. A at 28a.)

The case should have long ago been dismissed. Continuing a suit against personal representatives, who do not own or control the interest sought, does not extend the time for substituting a proper person defendant. *See Anderson v. Yungkau*, 67 S.Ct. 428 (1947).

Argument 6: Where grantors lack title to real property, do the grantees have standing to sue for constructive trust relief where the grantors have provided them with title insurance policies, as required by state law

and by the purchase agreements, and, where the grantees have not rescinded the purchase agreements? The 6th Circuit holds that the insured plaintiffs have standing to sue because they sustained injuries "in the form of defective title." (App. A at 34a) at sometime after September of 1981. This is a straight breach of warranty claim. Certainly, LTDC and HCDC are liable to their grantees, but the parties considered, in the purchase agreements, the possibility that the grantor's title might be defective, as well as how the grantees were to be protected against loss in such event. They expressly agreed upon a title search and guaranty by Lawyers Title.

Both development corporations were defunct before suit was instituted, so the foresight in requiring and providing title insurance benefitted the grantees. But, now, the insured plaintiffs are trying to obtain relief not available to them under Michigan law, in order to get Lawyers Title "off the hook." In *Holden Co. v. Tait Realty Co.*, 216 Mich. 633 (1921), Syllabi 2 and 3 read:

> 2. "Where a vendor contracted to convey that which it did not own, and to which it did not afterwards acquire any title, it could not be compelled to specifically perform."
> 3. "Where a vendor is unable to perform because it has no title to the land contracted to be conveyed, the purchaser's **only remedy** is by an action at law for damages for breach of the contract." (Emphasis supplied).

The insured plaintiffs did not and cannot possibly sustain any injury. That is what title insurance is (supposed to be) for. The insured plaintiffs parted with money, and, they are entitled to recover money from the insurer. MCL 559.194 provides:

> "Section 94. The developer shall furnish a purchaser buying a condominium unit from the developer a title insurance policy, in the amount of the purchase price, by a title insurance company licensed to do business in the state."

The panel did not appreciate the benefits of the policies received by the insureds from the development corporations. Without those policies, there would be nobody to bring suit for them, or, to collect from. With the policies, not even the passage of time would relieve Lawyers Title of its liability to them. To impose a constructive trust for the benefit of Lawyers Title is for the courts to rewrite the insured's purchase agreements.

Argument 7. The action against Rosemary is time-barred. Rosemary acquired her entireties interest on July 12, 1978. The entireties tenancy terminated on October 30, 1991. (App. A at 20a.) The first and only summons for her appearance in this matter was issued on February 5, 1999. It was 20 ½ years before her title was challenged.

Rosemary acquired, in 1978, an indestructible right of survivorship in the property as well as an indestructible right to the entirety in the event her husband released to her his entireties interest, which he did on October 30, 1991. The 6th Circuit somehow found a 15 year statute of limitations (App. A at 25a) to justify the action against Alexander, but, that statute expired, as to Rosemary 5 ½ years before a summons was issued for her.

In order to challenge the entireties possessory rights of Rosemary, an opponent would have to bring an action against her within 15 years by July 12, 1993. This was not done.

Under the panel's ruling, Alexander's creditors could recover against the property if he survived Rosemary, because he was served within the 15 year period it found applicable, but there was never any action brought against Rosemary during the 15 years after she acquired her title which challenged her survivorship or other entireties rights, or, within six years after October 30, 1991.

Argument 8. The Western District Court had no subject matter jurisdiction over the action because Section 362(a) stayed all actions against Rosemary or the property. Rosemary listed all of the 17.83 acres as part of her bankruptcy estate, and, claimed it all to be exempt, except as to allowed claims of joint creditors. There was no order entered by the Eastern District Bankruptcy Judge transferring any of the property to the Western District or denying Rosemary's claim of exemption. The first paragraph of defendants' (except the IRS) Motion to Dismiss, dated November 14, 1991, asserted that this suit was subject to the automatic stay provisions of 11 U.S.C. § 362, because Rosemary was in bankruptcy. No **general court** had jurisdiction to decide a new case. The congress had withdrawn from all other courts jurisdiction to hear or decide prepetition claims against a debtor or his property. Respondents' Motion (dated August of 1991) to lift the automatic stay was denied. The automatic stay was lifted by the bankruptcy court's order dated January 20, 1998, as to the constructive trust count. But, § 362(a) prohibits "the commencement or continuation" of such an action against a debtor or her property. No court had jurisdiction to entertain this action on October 16, 1991.

While a filing by a debtor can act as a stay of proceedings as to a suit filed prepetition, there is no statutory or logical basis for holding that the postpetition filing or a suit

expressly prohibited by law could create jurisdiction in the state court or in a federal court to which it is removed. A new action would have to be instituted **after** the automatic stay is lifted, which was not done in this case.

28 U.S.C. § 1334(e) gives the bankruptcy court exclusive jurisdiction over the debtor's property. The 6th Circuit panel (App. A at 22a) held that "a bankruptcy court can share its [exclusive] jurisdiction with other courts." The most adversely affected that persons by reasoning are the debtors' spouses and joint creditors of the couple. They are denied their constitutional due process 5th Amendment rights because they are given no opportunity in the bankruptcy court, or elsewhere, before the property is taken from their reach, to contest the transferee court's determination that a spouse's entireties interest is not included in debtor's bankruptcy estate.

Only the bankruptcy court can make a determination that a particular interest is not included in a debtor's bankruptcy estate, but first, the debtor, the debtor's spouse, and the joint creditors must be given an opportunity, in the bankruptcy court, for hearing, and, an opportunity to appeal an adverse decision. Thus, the claim in the Western District Court was not ripe for adjudication, because the bankruptcy court has not yet ruled on whether the property is in Rosemary's estate. *Texas v. United States*, 118 S.Ct. 1257 (1998), but claimed creditors of Alexander have been awarded his interest without he or the joint creditors being given any opportunity for hearing on the question whether his interest was exempt from individual claims.

Similarly, the priority claims of plaintiffs below were not ripe because they had no constructive trust over the property when suit was filed. That is what the 6th Circuit

ruled. (App. A at 15a.) And, of course, the IRS has no removal power, so its notice of removal could not invest jurisdiction in the Western District.

Finally, petitioners do not pretend to understand (App. A at 2a) how 12 insureds could obtain a constructive trust for all 24 units.

Argument 9. The circuit court erred in accepting counsels' unsupported and untrue statement of facts and basing its decision upon such untrue statement. The panel states as fact (App. A at 4a):

> At Alexander's request, Lawyers Title issued a title commitment to LTDC for the full 40.81 acres on July 18, 1978. Lawyers Title failed to discover the 17.83 acre conveyance from LTDC back to the Butchers, **presumably because the July 12, 1978 warranty deed had been recorded only four days earlier.** Alexander also failed to inform Lawyers Title of its existence. As a result, the title commitment erroneously listed LTDC as the owner of all 40.81 acres, which included the 17.83 acres no longer in LTDC's name." (Emphasis supplied).

This statement is factually incorrect. There is not, and never was, a title commitment dated July 18, 1978, as to the 17.83 acres (or the 40.81 acres) on this record. There could be no misrepresentation of fact or failure to inform the title insurer. Counsel's claims are complete fabrications, which they apparently deemed necessary to request relation back to July 12, 1978. The first commitment errors occurred in mid-1981 when the construction loan was being processed on the 17.83 acres. The first erroneous commitment, no. 4478, was

issued on April 29, 1981. It refers back to a mortgage signed by Alexander and Rosemary, dated July 13, 1978, which correctly shows LTDC to be the owner of record on that date (App. L at 94a and App. M at 95a). Parcel 1 is the 17.83 acres. The title examiner knew, before any error was made, that Alexander and Rosemary claimed a mortgager's interest in the property on July 134, 1978. Lawyer's Title insured that mortgage. It does seem incongruous for a party, clang to have been misled, to prevail by itself deceiving the court.

The courts cannot grant summary judgment on contested issues of fact. While this argument is placed last, it may be the most important one. If counsel are free to select false facts upon which to base requests for judicial relief, we are probably all wasting our time by going though the formal proceedings.

CONCLUSION

Including all of the entireties property into a debtor's bankruptcy estate and claiming the section 522(b)(2)(B) exemption leaves the entireties property in exactly the same state-law exemption status it had prior to the filing of the petition. A large number of debtors and their spouses would be adversely affected if the holding of the Sixth Circuit Court of Appeals is not reversed.

/s/_____
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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[Filed July 21, 2000]

Nos. 99-1185/1492/1523

Jobst W.F. Blachy, et al.,
Plaintiffs-Appellees,

v.

ROBERT E. BUTCHER and ROSEMARY BUTCHER, co-personal representatives of the estate of Alexander Michael Butcher, deceased; ROSEMARY BUTCHER, individually; LITTLE TRAVERSE DEVELOPMENT COMPANY, a Michigan corporation; H.C. DEVELOPMENT COMPANY, a Michigan corporation,
Defendants-Appellants
(99-1185/99-1492),

UNITED STATES OF AMERICA, on behalf of the Internal Revenue Service,

Defendant-Appellant)
(99-1523).)
)

Appeal from the United States District Court
for the Western District of Michigan at Grand Rapids.
No. 91-00979 - Gordon J. Quist, District Judge.

Argued: March 9, 2000

Decided and Filed: July 21, 2000

Before: WELLFORD, SILER, and GILMAN, Circuit Judges

OPINION

RONALD LEE GILMAN, Circuit Judge. Even a *diabolical* bar examiner would be reluctant to impose this case's complex mixture of subject matter jurisdiction, fraud, real estate, marital property, bankruptcy, tax liens, contributory negligence, equitable remedies, and civil procedure upon hapless law school graduates. Because reality often marches in where creators of hypotheticals fear to tread, however, we are the "hapless" appellate court judges obliged to struggle with this twisted tale of true-life conflict.

The essence of this complicated case is that twelve condominium owners and their title insurance company, Lawyers Title Insurance Corporation, have filed suit against Rosemary C. Butcher, the representatives of the estate of her late husband Alexander M. Butcher, Little Traverse Development Company (LTDC), H.C. Development

Company (HCDC), and the Internal Revenue Service (IRS), claiming that the condominium owners should be declared the legal titleholders of certain property previously owned by Alexander and Rosemary Butcher as tenants by the entirety. After eight years of proceedings in multiple courts, the United States District Court for the Western District of Michigan granted the plaintiffs' motion for summary judgment, imposing a constructive trust upon the disputed property owned by the Butchers and later purchased by the condominium owners. The Butchers, LTDC, and HCDC (collectively the Butcher defendants) have appealed, challenging the imposition of the constructive trust. Another key issue on appeal, brought by the United States on behalf of the IRS, challenges the portion of the district court's decision holding that a federal tax lien encumbering the Butchers' property is subordinate to the plaintiffs' constructive trust. For the reasons set forth below, we **REVERSE** the judgment of the district court regarding the status of the IRS's tax lien, but **AFFIRM** its judgment in all other respects.

I. BACKGROUND

A. Factual history

Alexander and Rosemary Butcher sought to develop resort condominiums in northern Michigan through LTDC, a Michigan corporation owned solely by Alexander. On June 30, 1978, Cedar Cove, a Michigan limited partnership in which Alexander was a partner, conveyed four parcels of land, consisting of approximately 100 acres in Little Traverse Township, to Alexander and Rosemary for the price of $640,000. By warranty deed dated July 6, 1978, the Butchers conveyed two of these four parcels, consisting of 40.81 acres,

to LTDC. Both the June 30 and July 6 deeds were recorded on July 12, 1978. That same day, Alexander signed a warranty deed in his capacity as president of LTDC, conveying the unmortgaged portion of the property, consisting of 17.83 acres, back to the Butchers as tenants by the entirety. This deed was recorded on July 14, 1978.

At Alexander's request, Lawyers Title issued a title commitment to LTDC for the full 40.81 acres on July 18, 1978. Lawyers Title failed to discover the 17.83 acre conveyance from LTDC back to the Butchers, presumably because the July 12, 1978 warranty deed had been recorded only four days earlier. Alexander also failed to inform Lawyers Title of its existence. As a result, the title commitment erroneously listed LTDC as the owner of all 40.81 acres, which included the 17.83 acres no longer in LTDC's name.

Thereafter, Alexander, on behalf of LTDC, executed a master deed dated November 1, 1978 that created Harbor Cove Phase II on the entire 40.81 acres. From 1981 to 1984, LTDC constructed and sold condominiums on portions of the acreage that included the 17.83 acres in dispute, nine of which were sold to the plaintiffs or their predecessors-in-interest.

On May 8, 1984, Alexander formed HCDC. He was the majority stockholder, president, and a director of this new corporation. In late October of 1984, Alexander signed a warranty deed on behalf of LTDC, purporting to convey 12.60 of the 17.83 acres to HCDC. Alexander, as president of HCDC, then signed a master deed creating Harbor Cove Phase III on the 12.60 acres. He also granted a mortgage to

Northwestern Savings and Loan Association on this acreage in order to secure a construction loan. After Lawyers Title issued a title commitment for the transaction, HCDC constructed condominiums on the development. It began selling the condominiums in December of 1985, three of which were sold to the plaintiffs or their predecessors-in-interest.

In the deeds conveying the condominiums to the plaintiffs, Alexander, acting as president of both LTDC and HCDC, represented that one or the other of those entities held title to the particular condominium being sold. He also stated under oath on several occasions that LTDC was the owner of the Phase II property and that HCDC was the owner of the Phase III property.

In August of 1988, the IRS issued an assessment against the Butchers for approximately $ 61,000 in unpaid federal income taxes that arose from the taxable year 1986. On September 9, 1988, the United States, acting on behalf of the IRS, filed a tax lien against the Butchers' property, seeking to attach Rosemary's and Alexander's interest in the 17.83 acres. The unpaid balance of the tax liability now exceeds $ 150,000.

On March 1, 1991, Rosemary filed for bankruptcy. Soon thereafter, the condominium owners learned of the July 12, 1978 conveyance from LTDC to the Butchers. On September 17, 1991, Rosemary amended her bankruptcy schedules to claim ownership of the 17.83 acres. Prior to that date, the Butchers had taken no action to claim title to any portion of the property. In fact, it was the plaintiffs, not the Butchers, who have paid the property taxes on the 17.83 acres

over the years. Alexander quitclaimed his interest in the 17.83 acres to Rosemary on October 31, 1991. He died in December of that year.

B. Procedural history

Rosemary filed her Chapter 7 bankruptcy petition in the United States Bankruptcy Court for the Eastern District of Michigan. Seven and a half months later, Lawyers Title and the condominium owners to whom Lawyers Title issued title insurance policies sued Alexander, LTDC, HCDC, and the IRS in Emmet County Circuit Court. The plaintiffs did not sue Rosemary because she was under the protection of the bankruptcy court.

After being served with the complaint, the IRS removed the state court action to the United States District Court for the Western District of Michigan on November 18, 1991. The district court entered an order staying the Western District action while the plaintiffs pursued an adversary proceeding in Rosemary's bankruptcy case. In both actions, the plaintiffs sought the imposition of a constructive trust.

Subsequent to Alexander's death in late 1991, the Butcher defendants moved to dismiss the district court action because Alexander's estate had not been substituted as a party following his death. The plaintiffs responded by moving to transfer venue to the bankruptcy court. On August 16, 1993, the district court denied the Butcher defendants' motion to dismiss, holding that the order staying the district court action pending the adversary proceeding in the bankruptcy court tolled the time limit for substituting the estate of Alexander into the suit under Rule 25(a)(1) of the Federal Rules of Civil

Procedure. (This part of the district court's order is not being contested on appeal.) The district court also granted the plaintiffs' motion to transfer venue to the Bankruptcy Court for the Eastern District of Michigan in the same order.

Both the plaintiffs' Western District action and Rosemary's bankruptcy proceeding were consolidated on November 18, 1993 in the bankruptcy court. On February 11, 1994, the bankruptcy court issued an order substituting the representatives of Alexander's estate, being Rosemary and her brother-in-law Robert E. Butcher, for Alexander.

In late November of 1994, the bankruptcy court granted the plaintiffs' motion for summary judgment, imposing a constructive trust over the 17.83 acres for the benefit of the condominium owners. The bankruptcy court also concluded that the constructive trust related back to 1978, thus predating the IRS's tax lien that arose against the Butchers in 1988.

The defendants appealed the bankruptcy court's ruling to the United States District Court for the Eastern District of Michigan. On July 31, 1995, the bankruptcy court's award of summary judgment to the plaintiffs was reversed by the district court. The district court's decision was based upon the case of *XL/Datacomp, Inc. v. Wilson (In re Omegas Group, Inc.)*, 16 F.3d 1443 (6th Cir. 1994), in which this court held that a bankruptcy court may not impose a constructive trust over estate property. *See id.* at 1452-53. Because of *In re Omegas Group*, the district court concluded that the proper remedy would be to have the debt declared nondischargeable. The case was then remanded to the bankruptcy court.

Upon remand, the bankruptcy court, still believing that a constructive trust was the appropriate remedy, entered an order transferring the plaintiffs' claim for a constructive trust over Rosemary's nonbankruptcy interest (being the interest that she acquired from Alexander) back to the United States District Court for the Western District of Michigan. It also lifted the automatic stay, which prohibits actions against debtors in bankruptcy, in order to permit the plaintiffs to add Rosemary as a defendant and to add a fraudulent conveyance count against the Butchers.

After the case was transferred back to the Western District, the plaintiffs in fact moved to amend their complaint to add Rosemary as a defendant and to add a fraudulent conveyance count against the Butchers. The motion was granted. All of the parties then filed cross-motions for summary judgment. Concluding that the facts of the case compelled the imposition of a constructive trust, the district court granted the plaintiffs' motion. It ruled that the Butcher defendants' arguments relating to standing, jurisdiction, and the statute of limitations were without merit. The district court also held that the constructive trust arose as of July 12, 1978, which was the date of the conveyance of the 17.83 acres by LTDC to Rosemary and Alexander. Because the district court retroactively applied the constructive trust as of that date, it concluded that the 1988 federal tax lien was subordinate to the plaintiffs' interest in the property and therefore ineffective.

The Butcher defendants filed a motion for reconsideration, arguing that a constructive trust should not have been imposed over Rosemary's interest (Rosemary's interest refers solely to her nonbankruptcy interest unless otherwise stated) because she had not been served with a

summons and a copy of the amended complaint. Acknowledging this oversight, the district court ordered the plaintiffs to serve Rosemary with a summons and a copy of the amended complaint within fourteen days. It further ordered that Rosemary file a response, setting forth her reasons why a constructive trust should not be imposed over her interest in the 17.83 acres.

The United States also filed a motion to clarify and reconsider, arguing that the district court appeared to be placing the constructive trust over both Rosemary's bankruptcy and nonbankruptcy interests. A supplemental motion for reconsideration was then filed by the Butcher defendants, arguing that summary judgment should be denied, but acknowledging that Rosemary's attorney had received a summons and a copy of the amended complaint pursuant to an agreement with opposing counsel. Shortly thereafter, Rosemary filed a twenty-one page response, setting forth her reasons why a constructive trust should not be imposed.

The arguments made in the Butcher defendants' motion for reconsideration, their supplemental motion for reconsideration, and the United States's motion to clarify were all rejected, except for the argument that the constructive trust was overbroad. Because the scope of the constructive trust was unclear in its initial order, the district court declared in a supplemental order that the scope of the constructive trust would be limited to the nonbankruptcy portion of Rosemary's overall interest in the 17.83 acres. The Butcher defendants then filed another motion to reconsider, which was denied. This appeal followed.

II. ANALYSIS

A. Standard of review

The Butcher defendants and the IRS are appealing various legal issues relating to the district court's grant of summary judgment on the plaintiffs' constructive trust claim. This court reviews de novo a district court's grant of summary judgment. *See Smith v. Ameritech*, 129 F.3d 857, 863 (6th Cir. 1997).

B. The district court's imposition of the constructive trust was proper

One of the Butcher defendants' primary arguments is that the district court erred when it imposed a constructive trust over Rosemary's interest in the 17.83 acres. The plaintiffs counter that a constructive trust was necessary in order to prevent Rosemary from being unjustly enriched by her and Alexander's inequitable conduct.

Under Michigan law, the imposition of a constructive trust is appropriate in order "to do equity or to prevent unjust enrichment. . . . Hence, such a trust may be imposed when property has been obtained through fraud, misrepresentation, concealment, . . . or any other similar circumstances which render it unconscionable for the holder of the legal title to retain and enjoy the property. . . ." *Kammer Asphalt Paving Co. v. East China Township Schs.*, 504 N.W.2d 635, 641-42 (Mich. 1993) (internal quotation marks and citations omitted).

Based on the following sequence of events, the district court imposed a constructive trust in order to prevent the

Butchers from being unjustly enriched at the plaintiffs' expense: On July 12, 1978, the Butchers recorded warranty deeds conveying the 17.83 acres from Cedar Cove to the Butchers and from the Butchers to LTDC. That same day, Alexander, in his capacity as president of LTDC, conveyed the 17.83 acres back to himself and Rosemary as tenants by the entirety. Thereafter, the Butchers, through their corporate entities, secured approval from the State of Michigan for the necessary building permits, obtained financing for the projects through various loans and mortgages, and sold the finished condominium units to the plaintiffs or their predecessors in title. During the process of obtaining the proper permits and financing, the Butchers, both individually and through LTDC and HCDC, represented to the State of Michigan, to the lenders, and to the purchasers that the 17.83 acres was owned by either LTDC or HCDC. Because the Butchers did not claim any individual ownership interest in the 17.83 acres until after Rosemary had filed her bankruptcy petition, the condominium owners had no reason to doubt the soundness of their insured legal title to the acreage in question. They also paid the property taxes in the intervening years.

The Butchers argue that the district court did not find that they had committed fraud. A constructive trust, however, may be imposed without a finding of fraud. *See McCreary v. Shields*, 52 N.W.2d 853, 856 (Mich. 1952) (holding that a constructive trust is imposed in order to prevent injustice, and that such a trust may be imposed when the circumstances show that it would be inequitable for the holder of legal title to retain the property). Because the Butchers participated or acquiesced in actions certifying LTDC's and HCDC's ownership of the 17.83 acres when they knew that they had retained legal title to the property as individuals, and because

the Butchers stood silent while the plaintiffs paid the property taxes on the 17.83 acres, the district court's imposition of the constructive trust over Rosemary's interest was proper. *See Kren v. Rubin*, 61 N.W.2d 9, 11 (Mich. 1953) (observing that a very strong justification for imposing a constructive trust arises when a party allows another to pay his property taxes).

The Butchers also argue that they were under no obligation to expressly inform the plaintiffs about the July 12, 1978 conveyance from LTDC to the Butchers. Assuming this to be true, they were still under an obligation not to deceive and mislead the plaintiffs by warranting that LTDC and HCDC owned the property and by allowing the plaintiffs to pay the property taxes.

Finally, the Butchers argue that imposing a constructive trust is inappropriate because the plaintiffs' remedy is against Lawyers Title for negligently failing to discover the July 12, 1978 conveyance back to the Butchers. The Butchers' misleading and deceptive conduct, however, will not be rewarded or justified simply because Lawyers Title failed to catch it. *See Grzesick v. Cepela*, 603 N.W.2d 809, 815 (Mich. Ct. App. 1999) ("A comparative negligence defense is inapplicable to a claim of intentional tort"); *Law Offices of Steven D. Smith, P.C. v. Borg-Warner Sec. Corp.*, 993 P.2d 436, 444 (Alaska 1999) ("Mere negligence of the plaintiff is not a defense to an intentional tort.") (internal quotation marks omitted). Although the facts may not conclusively demonstrate fraud, Alexander's and Rosemary's failure to inform Lawyers Title of the July 12, 1978 conveyance back to themselves just before Alexander requested Lawyers Title to issue a title commitment to LTDC that included the 17.83 acres is a strong indication of fraud.

Consequently, we affirm the district court's decision to impose a constructive trust.

C. The constructive trust does not defeat the IRS's tax lien

The district court determined that the constructive trust should be retroactive to July 12, 1978, the date of the deed from LTDC to the Butchers. Accordingly, the district court held that the Butchers did not have an interest in the property to which the 1988 tax lien could attach. It thus concluded that the tax liens were subordinate to the plaintiffs' beneficial interest in the property arising from the constructive trust. The United States appeals this ruling, arguing that any constructive trust claim that the plaintiffs may have had does not affect the validity of the federal tax lien.

Title 26 U.S.C. § 6321 provides that "[i]f any person liable to pay any tax neglects or refuses to pay the same after demand, the amount . . . shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person." "The threshold question . . . in all cases where the Federal Government asserts its tax lien, is whether and to what extent the taxpayer had property or rights to property to which the tax lien could attach." *Aquilino v. United States*, 363 U.S. 509, 512 (1960) (internal quotation marks omitted). "Although state law creates legal interests and rights in property, federal law determines whether and to what extent those interests will be taxed." *United States v. Irvine*, 511 U.S. 224, 238 (1994).

Under Michigan law, a "constructive trust is strictly not a trust at all, but merely a remedy administered in certain

fraudulent breaches of trusts." *Soo Sand & Gravel Co. v. M. Sullivan Dredging Co., 244 N.W. 138, 140 (Mich. 1932).* Accordingly, a constructive trust does not arise until a judicial decision imposes such a trust under Michigan law. The federal tax lien in the present case arose in 1988. Because the constructive trust was not judicially imposed over the 17.83 acres until a decade later, the government argues that the federal tax lien should be given precedence over the plaintiffs' interest.

Even if Michigan law allows the doctrine of "relation back" to give the beneficiary of a constructive trust priority over private intervening interests, this would not be determinative as to the IRS. The priority of a federal tax lien against competing claims is governed by federal law. *See United States v. Dishman Independent Oil, Inc.*, 46 F.3d 523, 526 (6th Cir. 1995) ("It is undisputed that when a federal lien is involved, the relative priority between competing liens is a question of federal law determined by the principle 'the first in time is the first in right.'"). Federal law, however, makes no provision for the subordination of a tax lien through the use of the "relation back" doctrine. *See id.* at 527; *United States v. Security Trust & Savings Bank of San Diego,* 340 U.S. 47, 50 (1950) (holding that a property right that comes into existence by court action, such as a judgment lien, does not relate back to some earlier date to destroy the priority of a federal tax lien); *Drye v. United States*,__ U.S. __, 120 S. Ct. 474, 478 (1999) (holding that a state disclaimer law, which applies retroactively and treats the disclaimant as having predeceased the decedent, does not defeat a federal tax lien that has already attached to the disclaimant's property).

Only competing claims that meet the federal standard of "choateness" before the federal tax lien arises can prime a federal tax lien. *See United States v. Equitable Life Assurance Society of the United States*, 384 U.S. 323, 328 (1966) (holding that a federal tax lien was entitled to priority over a mortgagee's inchoate claim for attorney's fees). A state-created lien is choate only when "there is nothing more to be done," i.e., "when the identity of the lienor, the property subject to the lien, and the amount of the lien are established." *United States v. City of New Britain*, 347 U.S. 81, 84 (1954). In *Dishman*, the issue was "whether a state attachment lien has priority over a federal tax lien if the property subject to the liens was attached prior to the time the federal tax lien was filed, although final judgment on the attachment lien was not handed down until after the federal tax lien was filed." *Dishman*, 46 F.3d at 526. This court held that the state attachment lien was subordinate to the federal tax lien because the state lien only became choate upon the state judgment, which came after the federal tax lien was filed. *See id.* at 526-27. Furthermore, in *In re Omegas Group*, 16 F.3d 1443 (6th Cir. 1994), this court held that "because a constructive trust, unlike an express trust, is a remedy, it does not exist until a plaintiff obtains a judicial decision finding him to be entitled to a judgment "impressing" defendant's property or assets with a constructive trust." *Id* at 1451.

Based on the reasoning in *Dishman* and *In re Omegas Group*, the plaintiffs' constructive trust claim only became choate when the district court granted judgment in 1998. The district court, however, relied upon the following three cases for its holding that a constructive trust can be retroactively applied to defeat a federal tax lien: *FTC v. Crittenden*, 823 F.

Supp. 699 (C.D. Cal. 1993), *aff'd*, 19 F.3d 26 (9th Cir. 1994), *Reliance Insurance Co. v. Brown*, 40 B.R. 214 (W.D. Mo. 1984), *TMG II v. United States*, 778 F. Supp. 37 (D.D.C. 1991), *aff'd in part and rev'd in part*, 1 F.3d 36 (D.C. Cir. 1993). We find these cases unpersuasive because they fail to explain how a constructive trust that is judicially imposed after the filing of a federal tax lien can retroactively meet the federal standard of "choateness," thus priming the lien. Furthermore, these cases are inconsistent with this court's decisions in *Dishman* and *In re Omegas Group*. The district court's only mention of *In re Omegas Group* was in a footnote supporting the proposition that a district court may impose a constructive trust, and it did not mention *Dishman* at all.

Although we agree that the equitable remedy as between the Butchers and the plaintiffs is to impose a constructive trust, the analysis is different with respect to the IRS. The IRS properly perfected its interest by filing a tax lien against the Butchers' property. On the other hand, the plaintiffs, directly or indirectly, exercised a lack of diligence in failing to discover the July 12, 1978 conveyance back to the Butchers. It was this lack of diligence that contributed to the present legal quagmire. Consequently, from an equity standpoint, we believe that it would be unfair to the IRS, a party without "fault," to prime the IRS's choate tax lien by retroactively applying a constructive trust in favor of the plaintiffs. If the condominium owners wish to recover for the monetary loss caused by the tax lien, they might have a remedy against Lawyers Title.

In summary, a judicially-created equitable remedy cannot be applied retroactively to defeat a choate federal tax

lien. Also, as between the plaintiffs and the IRS, the equities favor the IRS. We therefore reverse the ruling of the district court on this issue.

D. The district court for the Western District of Michigan had jurisdiction over the nonbankruptcy portion of Rosemary's interest in the 17.83 acres, and neither Alexander's quitclaim deed nor his subsequent death extinguished the plaintiffs' constructive trust claim

1. *The interest that Rosemary received from Alexander's quitclaim deed was not part of her bankruptcy estate*

The Butchers argue that because Rosemary and Alexander owned the 17.83 acres as tenants by the entirety, all of the property became part of her bankruptcy estate when she filed her bankruptcy petition. Alternatively, they claim that Rosemary became the sole owner of the property when Alexander quitclaimed his interest in the property to her shortly before his death. Either way, they argue that the district court in the Western District of Michigan lacked jurisdiction over this dispute because exclusive jurisdiction over the entire property resided in the bankruptcy court for the Eastern District of Michigan. We disagree.

As to the Butchers' tenants-by-the-entirety argument, there is no doubt that Rosemary's tenancy interest in the 17.83 acres became part of her bankruptcy estate when she filed for bankruptcy on March 1, 1991. *See* 11 U.S.C.

§ 541(a)(1) (providing that the property of the estate includes "all legal or equitable interests of the debtor in property as of the commencement of the case"). Moreover, in *In re Grosslight*, 757 F.2d 773 (6th Cir. 1985), this court discussed Michigan's tenants-by-the-entirety concept in relation to federal bankruptcy law as follows:

> Michigan is among the minority of states retaining the common law tenancy by the entirety. Tenants by the entirety, who must be husband and wife, hold under a single title with right of survivorship. Neither husband nor wife acting alone can alienate any interest in the property, nor can the creditors of one levy upon the property; but their joint creditors can reach entireties property. . . . It is now established law that [11 U.S.C. § 541(a)] brings entireties property into the bankruptcy estate.

Id. at 775 (citations omitted).

With respect to the existence of separate interests in entireties property, this court has made the following ruling regarding Tennessee's similar property regime:

> Under Tennessee law, Arango does not, as an individual, have a present possessory interest in entireties property. Instead, Arango and his wife, as a unit which is separate and apart from them as individuals, have a present possessory interest in entireties property. The practical effect of Tennessee's legal construct

> is that Arango has the right to use and enjoy entireties property, at least until his wife may predecease him or he and his wife, together, convey their present possessory interest, despite the legal belief that Arango does not have a present possessory interest. Under the Bankruptcy Code, on the other hand, Arango does have a present possessory interest in entireties property which is considered part of his individual bankruptcy estate under section 541(a)(1).

Arango v. Third National Bank (*In re Arango*), 992 F.2d 611, 614 (6th Cir. 1993). By recognizing an interest in entireties property that is part of a debtor's bankruptcy estate, *In re Arango* implicitly recognized the corresponding interest that would not be part of the debtor's estate.

To shed further light on the issue of how the bankruptcy of one spouse affects entireties property, a leading bankruptcy treatise provides that a "trustee can sell [a debtor's interest in entireties property], subject to the spouse's right of first refusal. The non-filing spouse receives his or her share of the proceeds and the trustee keeps the balance for distribution." Daniel R. Cowans, Bankruptcy Law and Practice § 7.5, at 290 (7th ed. 1998); *Finneran v. Associates Fin. Servs.* (*In re Blair*), 151 B.R. 849, 851 (Bankr. S.D. Ohio 1992), *aff'd*, 33 F.3d 54 (6th Cir. 1994) (observing that "[d]ivision of entireties equity between the estate and the debtor's spouse or co-owner is supported by a majority of courts."); 11 U.S.C. § 363(j), (h) (providing that "the trustee shall distribute to the debtor's spouse" his or her portion of

the proceeds from the sale of tenancy-by-the-entirety property).

In arguing that there is no separate property interest that can be reached by creditors of only one of the entireties tenants, the Butchers rely heavily upon the case of *Craft v. United States,* 140 F.3d 638 (6th Cir. 1998). The *Craft* case is distinguishable, however, because the property at issue was not part of a bankruptcy estate. Consequently, this court did not consider how a bankruptcy filing might affect the respective interests in entireties property of a debtor and non-debtor spouse. In contrast, this was precisely the situation in both *Grosslight* and *Arango*.

The Butchers' other theory concerning the Western District of Michigan's alleged lack of jurisdiction relates to Alexander's quitclaiming his portion of the 17.83 acres to Rosemary on October 31, 1991, which was seven months after Rosemary had filed for bankruptcy. This conveyance terminated the tenancy by the entirety. *See* M.C.L. § 557.101 (providing that a conveyance of an entireties interest by one spouse to the other terminates the entireties interest). Because Alexander did not quitclaim his interest in the 17.83 acres until after 180 days had passed since the filing of Rosemary's bankruptcy petition, however, Rosemary possessed this interest outside of bankruptcy. *See generally,* 11 U.S.C. § 541(a)(5)(A) (providing that if a debtor receives property within 180 days of her bankruptcy petition, then the interest becomes property of the estate). At this point, Rosemary had an interest in the 17.83 acres that was under the control of the bankruptcy trustee, and she had an interest in the 17.83 acres that was held outside of bankruptcy.

There was no merger of these separate interests. In fact, during the bankruptcy proceedings, the Butchers argued that Rosemary held a separate, nonbankruptcy interest in the 17.83 acres. The Butchers, however, are not judicially estopped from now taking a different position because there is no evidence that the Butchers were successful with this argument, which is a necessary element of judicial estoppel. *See Teledyne Industries, Inc. v. NLRB*, 911 F.2d 1214, 1217-18 (6th Cir. 1990) (observing that a party is not bound by an unsuccessful argument in a prior proceeding).

Consequently, after the bankruptcy court transferred the constructive trust count to the district court in the Western District of Michigan and lifted the automatic stay, the district court had jurisdiction to adjudicate the constructive trust issue with respect to Rosemary's nonbankruptcy interest in the 17.83 acres. The Butchers' argument that the district court did not have jurisdiction to impose a constructive trust on property that Rosemary acquired postpetition because the constructive trust was based upon the plaintiffs' prepetition claims ignores the fact that the trust was imposed by a district court, not a bankruptcy court, that the automatic stay had been lifted, and that the constructive trust only applies to Rosemary's nonbankruptcy interest.

The Butchers further argue that the plaintiffs are not entitled to the benefit of a constructive trust over Rosemary's interest because she is not liable for the actions of Alexander, LTDC, and HCDC. This argument is unavailing because Rosemary stands in the shoes of Alexander with respect to her nonbankruptcy interest in the 17.83 acres, and if Alexander was not entitled to retain his interest in the property, then that interest is subject to a constructive trust despite the fact that

Rosemary now owns it. *See Florida East Coast Railway Company v. Patterson,* 593 So. 2d 575, 577 (Fla. Dist. Ct. App. 1992) ("[O]ne who accepts a quitclaim deed is conclusively presumed to have agreed to take the title subject to all risks as to defects . . . .") (citation and internal quotation marks omitted).

Moreover, even if Rosemary's interest in the property was not burdened by the actions of Alexander, a constructive trust could still be imposed over her interest because she herself does not have clean hands. Rosemary acquiesced in the July 12, 1978 conveyance from LTDC to herself and her husband, she did not inform the plaintiffs of the July 12 conveyance, and she allowed the plaintiffs to pay the taxes on the property without disclosing that she and Alexander held legal title. The fact that Rosemary did not play as big a role as Alexander in deceiving and misleading the plaintiffs is not determinative.

In short, Alexander had a separate interest in the 17.83 acres that did not become part of Rosemary's bankruptcy estate either at the time she filed her bankruptcy petition or when she acquired Alexander's interest through his quitclaim deed. Accordingly, we affirm the district court's ruling on this issue.

2. *The bankruptcy court can share its jurisdiction*

In a related argument, the Butchers claim that because 28 U.S.C. § 1334(e) gives the bankruptcy court exclusive jurisdiction over the debtor's property, that the district court in the Western District of Michigan lacked jurisdiction to rule on the constructive trust claim. The plaintiffs counter that the

bankruptcy court's transfer of the constructive trust claim back to the district court was proper because the bankruptcy court can share its jurisdiction.

Section 1334(e) provides as follows: "The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction of all of the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate." In the first place, the bankruptcy court only transferred the plaintiffs' constructive trust claim on Rosemary's *nonbankruptcy* interest to the Western District of Michigan. Because Rosemary's interest was acquired from Alexander long after she had already filed for bankruptcy, this transfer of jurisdiction does not offend § 1334(e). Second, *in Noletto v. Nations Bank Mortgage (In re Noletto),* 244 B.R. 845 (S.D. Ala. 2000), the district court held that § 1334(e) must be read narrowly in order to avoid a conflict with the other bankruptcy venue provisions. *See id.* at 852-53. The district court in *Cook v. Cook,* 220 B.R. 918 (Bankr. E.D. Mich. 1997), also addressed § 1334(e) and concluded that this section does not prevent a bankruptcy court from transferring selected issues to another court. *See id.* at 922. We agree with the decisions in *In re Noletto* and *Cook* and hold that a bankruptcy court can share its jurisdiction with other courts. Accordingly, we affirm the district court on this point.

E. The plaintiffs have standing to sue for a constructive trust

The Butcher defendants argue that the plaintiffs have no standing to bring or maintain their cause of action for multiple reasons, including the lack of a demonstrable chain

of title, the non-appearances of several plaintiffs, the sale of some of the condominium units prior to initiating the cause of action, the purchase or sale of condominium units with knowledge of the title defects, attempted double recovery, and that the contracts and deeds that the plaintiffs rely upon are void and therefore create no legal or equitable rights in the property. These arguments are unavailing because they do not address the elements that constitute standing.

To satisfy the constitutional requirement of standing, a plaintiff must establish three elements: "(1) an injury in fact that is concrete and particularized; (2) a connection between the injury and the conduct at issue--the injury must be fairly traceable to the defendant's action; and (3) likelihood that the injury would be redressed by a favorable decision of the Court." *Southwestern Pa. Growth Alliance v. Browner,* 144 F.3d 984, 988 (6th Cir. 1998) (internal quotation marks and citation omitted). The plaintiffs have alleged injury in fact in the form of defective title, which is traceable to the Butcher defendants' conduct, and the injury can be redressed through the imposition of a constructive trust. Lawyers Title has standing pursuant to the subrogation clauses in the title insurance policies it issued to the condominium owners. We thus affirm the district court on this issue.

F. The case could be removed despite the fact that the plaintiffs named the IRS in their suit rather than the United States

The Butcher defendants next argue that because the plaintiffs named the IRS in their original complaint and in their amended complaint rather than the United States, the action cannot be removed to federal court pursuant to 28

U.S.C. § 1444. This section allows for the removal of any case where suit is brought against the United States regarding one of its liens. Even though the Butcher defendants are correct that the IRS has no capacity to be sued, and that the plaintiffs should have named the United States as a party instead of the IRS, such defects are not fatal. *See Labry v. Internal Revenue Serv.*, 940 F. Supp. 148, 149 (E.D. La. 1996) (holding that although the United States rather than the IRS was the proper party, a misnomer does not preclude removal under 28 U.S.C. § 1444); *Bernard v. Internal Revenue Service*, No. 91-30253-RV; 1991 WL 327960 (N.D. Fla. Dec. 13, 1991) (same). We agree with the reasoning of these decisions, and conclude that the plaintiffs' technical defect did not preclude removal in this case.

G. The plaintiffs' constructive trust claim is not barred by the statute of limitations

The Butcher defendants also argue that the plaintiffs' constructive trust claim is barred by the statute of limitations, which they insist is six years. The applicable statute of limitations, however, is fifteen years for the recovery of land. *See* M.C.L. § 600.5801(4); *Gorte v. Department of Transportation*, 507 N.W.2d 797, 799 (Mich. Ct. App. 1993). Because the first deed was not delivered to the plaintiffs until October 22, 1981, and because the plaintiffs brought suit in state court against the defendants on October 16, 1991, the plaintiffs' constructive trust claim is not barred by the statute of limitations.

The Butcher defendants, on the other hand, contend that the accrual date of the plaintiffs' claim is July 12, 1978, the date on which LTDC conveyed title to the Butchers. This

contention is erroneous because the plaintiffs' claim did not accrue until they became entitled to the possession of the land, which was when they received their warranty deeds. *See* M.C.L. § 600.5829(5) ("[T]he claim accrues when the claimant or the person under whom he claims first becomes entitled to the possession of the premises under the title upon which the entry or action is founded."). In any event, even an accrual date of July 12, 1978 is still within fifteen years of October 16, 1991. Accordingly, we affirm the district court on this issue.

H. The district court's order granting summary judgment is valid as to Rosemary

The Butcher defendants next contend that the constructive trust is void as against Rosemary because it was imposed on December 14, 1998, at which time Rosemary had not yet been served with a summons and copy of the amended complaint. This argument was first raised in their motion for reconsideration, following the award of summary judgment to the plaintiffs. The district court partially agreed with this argument and ordered the plaintiffs to serve Rosemary with a summons and copy of the amended complaint. It then gave her an opportunity to respond to the plaintiffs' arguments. Shortly thereafter, the Butcher defendants filed a supplemental motion for reconsideration. In that motion, they argued that the district court's order, which imposed the constructive trust, was void because the court had no authority to assert personal jurisdiction over Rosemary after entering a final judgment. Contrary to the Butcher defendants' arguments, the district court had the authority to amend its judgment based on its mistaken belief that Rosemary had been served in her individual capacity. *See*

Kingvision Pay-Per-View Ltd., v. Lake Alice Bar, 168 F.3d 347, 350 (9th Cir. 1999) (holding, in a case where the plaintiff had argued that "the district court lacked jurisdiction to amend its judgment more than ten days after entry, because that is the time limit under Federal Rule of Civil Procedure 59," that a district court can amend its judgment because of mistake or inadvertence months after judgment has been entered pursuant to Rule 60(b) of the Federal Rules of Civil Procedure.) We agree with this reasoning, and conclude that the district court correctly rejected this argument.

With respect to personal jurisdiction, the district court obtained jurisdiction over Rosemary when Robert Butcher, counsel for the Butcher defendants, received a copy of the amended complaint on Rosemary's behalf. He had agreed to accept service of the amended complaint on her behalf and to return a waiver of service of the summons. Rosemary's argument that acceptance of the amended complaint by Robert Butcher was contingent upon her receipt of additional time to respond to the district court's order should have been immediately raised and clearly articulated in a proper motion. Because she failed to do so, this argument is procedurally defaulted. *See Trustees of Central Laborers' Welfare Fund v. Lowery*, 924 F.2d 731, 732 (7th Cir. 1991) ("A party may waive a defense of insufficiency of process by failing to assert it seasonably in a motion . . . Where a defendant leads a plaintiff to believe that service is adequate . . . courts have not hesitated to conclude that the defense is waived.")

Moreover, Rosemary had been previously served with the amended complaint in her capacity as a personal representative of Alexander's estate. She had notice and an opportunity to be heard. In fact, Rosemary, in her individual

capacity, filed a twenty-one page response on February 19, 1999, arguing that the plaintiffs should not be granted summary judgment.

Rosemary was also properly added as a defendant because Alexander's interest in the property, which is the subject of the suit, was transferred to her during the course of the litigation. Rule 25(c) of the Federal Rules of Civil Procedure provides as follows:

> In case of any transfer of interest, the action may be continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party. Service of the motion shall be made as provided in subdivision (a) of this rule.

"Rule 25(c) does not require that anything be done after an interest has been transferred." *Luxliner P.L. Export, Co. v. RDI/Luxliner, Inc.*, 13 F.3d 69, 71 (3d Cir. 1993) (internal quotation marks and citation omitted). Moreover, "although substitution is usually effected during the course of litigation, substitution has been upheld even after litigation has ended as long as the transfer of interest occurred during the pendency of the case." *Id.* The addition of Rosemary as a defendant was based upon her receipt of Alexander's interest after the case was filed against Alexander. Because the plaintiffs' claim against Rosemary is a continuation of their claim against Alexander, that claim is not barred by the applicable statute of limitations. *See id.* at 71. Consequently, Rosemary's substitution into the case was appropriate.

I. Other arguments raised by the Butcher defendants

The Butcher defendants have also raised arguments that (1) the statute of frauds prevents imposition of the constructive trust, (2) the bankruptcy court had no authority to transfer the constructive trust claim to the Western District of Michigan because the claim had been rendered moot, (3) the action was rendered moot when Alexander was substituted out of the case, (4) there is no unjust enrichment when a title insurer pays its policy claims, (5) equity has no jurisdiction where the legal relief is adequate, (6) there can be no constructive trust because the plaintiffs never acquired good title, and (7) if Alexander obtained the 17.83 acres improperly, then he did not have any interest to quitclaim to Rosemary. Most of these arguments are poorly articulated and are variations of other arguments that have already been addressed. All are totally without merit. Accordingly, after carefully reviewing the arguments and finding them unavailing, we affirm the district court on these issues for the reasons set forth in its order and judgment without further discussion.

III. CONCLUSION

For all of the reasons set forth above, we **REVERSE** the portion of the district court's judgment holding that the IRS's tax lien is subordinate to the plaintiffs' constructive trust. In all other respects, we **AFFIRM** the judgment of the district court.

CONCURRING IN PART, DISSENTING IN PART

SILER, Circuit Judge, concurring in part and dissenting in part. I would affirm the decision of the district court in full. Therefore, I concur in most of the conclusions made by the majority opinion, but I dissent from that part of the decision which holds that the district court erred in finding that the constructive trust was retroactive to 1978 and, therefore, was superior to the 1988 tax lien filed by the IRS.

Although, as the majority finds, there is language in cases from this court which would support a determination that the federal tax lien is superior to the interest of constructive trust beneficiaries, those cases arose under entirely different circumstances. For instance, while *In re Omegas Group, Inc.*, 16 F.3d 1443, 1451 (6th Cir. 1984), declared that a constructive trust does not exist until a judicial decision determines that it exists, it arose out of a bankruptcy proceeding. It was enforcing a bankruptcy policy under 11 U.S.C. § 541(d), as the court cited with approval the decision in *The Oxford Organisation, Ltd. v. Peterson,* 144 B.R. 385, 388 (1992). It related the general policy that the statute does not allow a claimant of the debtor "to take ahead of all creditors, and indeed, ahead of the trustee." *In re Omegas Group, Inc.*, 16 F.3d at 1451.

Similarly, in the case of *United States v. Dishman Indep. Oil, Inc.*, 46 F.3d 523, 526 (6th Cir. 1995), this court held that the federal tax lien in that case was superior to a prejudgment lien filed by the creditor of the taxpayer. It did not involve a constructive trust at all. It set out the priority of a federal tax lien under the Tax Code, which is not directly in point here, because the prejudgment lien was not the same as a judgment lien.

Instead, I would follow the decision of the district court in finding that there is no Sixth Circuit authority on the priority of a federal tax lien over a constructive trust beneficiary who has been declared a beneficiary relating back to a time prior to the filing of the tax lien. One of the cases cited by the district court, *Reliance Ins. Co. v. Brown,* 40 B.R. 214 (W.D. Mo. 1984), appears to be in conflict with the decision of *In re Omegas Group*, so it is of no benefit. Another case relied upon by the district court, however, held that the IRS cannot have any better rights than a taxpayer did. *See Hobson v. United States,* 168 F. Supp. 117, 119 (W.D. Mich. 1958). A similar conclusion was reached in *FTC v. Crittenden,* 823 F. Supp. 699, 704 (C.D. Cal. 1993), *aff'd*, 19 F.3d 26 (9th Cir. 1994); *see also TMG II v. United States,* 778 F. Supp. 37, 46 (D.D.C. 1991), *aff'd in part and rev'd in part*, 1 F.3d 36 (D.C. Cir. 1993) (IRS conceded that "tax liens do not attach to property subject to constructive trust.")

Although the majority feels that the IRS is a party without "fault," I would not find that it is more faultless than the condominium owners, who relied upon legal opinions that they had proper title. It was the fault of their title company, not the condominium owners themselves. One might even argue that the IRS could have gone upon the property and seen all of the construction of the condominiums, which would put some persons on notice that the Butchers no longer owned the property. Thus, I would find that neither party seems to be more at fault than the other, but that the IRS had no better rights than did the Butcher family. Their property was held through a series of fraudulent moves. If one were to accept the majority ruling here, I wonder what the result would be if the Butchers had instead purchased the real estate from the condominium owners with counterfeit money or cold

checks and the IRS had filed tax liens against the Butchers before the condominium owners had discovered the fraud. Under the majority's decision, if a court later declared a constructive trust over the realty, the federal tax lien would prevail. That would be both unfair and inequitable to the condominium owners and I do not think it should be the law of this circuit.

Therefore, I would affirm the district court in full.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Nos. 99-1185; 99-1492; 99-1523

[Filed July 21, 2000]

JOBST W.F. BLACHY, et al.,
Plaintiffs - Appellees,

v.

ROBERT E. BUTCHER and ROSEMARY BUTCHER, co-personal representatives of the estate of Alexander Michael Butcher, deceased; ROSEMARY BUTCHER, individually; LITTLE TRAVERSE DEVELOPMENT COMPANY, a Michigan corporation; H.C. DEVELOPMENT COMPANY a Michigan corporation,
Defendants - Appellants
(99-1185/1492),

UNITED STATES OF AMERICA, on behalf of the Internal Revenue Service,
Defendant - Appellant
(99-1523)

Before: WELLFORD, SILER, and GILMAN, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court
for the Western District of Michigan at Grand Rapids.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the portion of the district court's judgment holding that the Internal Revenue Services's tax lien is subordinate to the plaintiffs' constructive trust is REVERSED. IT IS FURTHER ORDERED that the judgment of the district court is AFFIRMED in all other respects.

ENTERED BY ORDER OF THE COURT

/s/_____
Leonard Green, Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

No. 1:91-CV-979

[Filed April 14, 1999]

JOBST W.F. BLACHY, et al.,
Plaintiffs,

v.

ROBERT BUTCHER, et al.,
Defendants.

HON. GORDON J. QUIST

ORDER

The Court has before it the Motion of all Defendants, except the United States (the "Butcher Defendants"), for Relief, Pursuant to F.R. Civ. P. 60(b)(4), from the Court's Order dated December 14, 1998, and its Order and Final Judgment dated March 10, 1999. The Court has considered the arguments raised by the Butcher Defendants in their motion and finds that they were fully addressed in the Court's prior Opinions and Orders. Therefore,

IT IS THEREFORE ORDERED that the Motion Of All Defendants, Except The United States Of America, For Relief, Pursuant to F.R.Civ. P. 60(b) (4), From The Court's Final Order Dated December 14, 1998, And From the Court's Opinion, And, From Its order And Final Judgment Each Dated March 10, 1999, Granting Plaintiffs Motion For Summary Judgment And Changing The Scope Of The Constructive Trust And Denying All Other Unresolved Motions (docket no. 91) is **DENIED**.

Dated: APRIL 14, 1999

/s/_____
GORDON J. QUIST
UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

No. 1:91-CV-979

[Filed February 2, 1999]

JOBST W.F. BLACHY, et al.,
Plaintiffs,

v.

ROBERT BUTCHER, et al.,
Defendants.

HON. GORDON J. QUIST

ORDER

The court has before it the Motion of all Defendants, except the United States (the "Butcher Defendants"), for reconsideration of the Court's Opinion and Order dated December 14, 1998. The Butcher Defendants contend that the Court's Order erroneously imposed a constructive trust over Rosemary because she had not been served with a summons and copy of the amended complaint and therefore was not subject to the Court's jurisdiction at the time the December

14, 1998, Order was entered. Based upon its review of the file, the Court notes that at the time the Order was entered, Rosemary had not been served with a summons and copy of the amended complaint. Therefore,

IT IS THEREFORE ORDERED that within fourteen (14) days of the date of this Order, Plaintiffs shall serve Rosemary Butcher with a summons and copy of the amended complaint as provided by the Federal Rules of Civil Procedure, plus a copy of Plaintiffs' motion for summary judgment and all briefs in support thereof, plus a copy of this Order.

IT IS FURTHER ORDERED that within fourteen (14) days after the date of service, Rosemary shall file a brief in response to Plaintiffs' Motion for Summary Judgment setting forth the reasons why a constructive trust should not be imposed over Rosemary's interest in the property.

Dated: FEBRUARY 1, 1999

/s/_____
GORDON J. QUIST
UNITED STATES DISTRICT JUDGE

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

No. 1:91-CV-979

[Filed March 10, 1999]

JOBST W.F. BLACHY, et al.,
Plaintiffs,

v.

ROBERT BUTCHER, et al.,
Defendants.

HON. GORDON J. QUIST

ORDER AND FINAL JUDGMENT

In accordance with the Opinion filed this date.

IT IS HEREBY ORDERED that the Motion of all Defendants, Except the United States of America, for Reconsideration of the Court's Opinion and Order, Each Dated December 14, 1998, Granting Plaintiffs [sic] Motion for Summary Judgment (docket no.74) is **GRANTED IN PART AND DENIED IN PART**. The motion is **GRANTED**

with respect to the scope of the constructive trust imposed by the December 14, 1998, Order and is **DENIED** on all other grounds.

IT IS FURTHER ORDERED that the Supplemental Motion of all Defendants, Except the United States of America, for Reconsideration of the Court's Order, Dated December 14, 1998, Granting Plaintiffs Motion for Summary Judgment and/or Enlargement of Time to Respond (docket no. 82) is **DENIED**.

IT IS FURTHER ORDERED that the United States' Motion to Alter or Amend or at Least to Clarify (docket no. 72) is **GRANTED IN PART DENIED IN PART**. The motion is **GRANTED** with respect to the scope of the constructive trust imposed by the December 14, 1998, Order and with respect to the United States' request for clarification that the Court's references to Defendants' arguments at pages 8, 14, 18, and 19 n.7 of the Court's December 14, 1998, Opinion as being "without merit" or "specious" were to arguments raised by the Butcher Defendants rather than the United States. The motion is **DENIED** with respect to the request for clarification of whether the Court found fraud by Alexander Butcher.

IT IS FURTHER ORDERED that the Court's December 14, 1998 Order imposing a constructive trust upon the real property legally described as:

> Part of the South ½ of Section 16, T35N, R5W, Little Traverse, County of Emmet, and State of Michigan, described as: Commencing at the West 1/4 corner of Section 16, T35N,

R5W, Emmet County, Michigan; thence S89°32'30"E 2376.18 feet; thence S9°46'50"W 350.00 feet to the PLACE OF BEGINNING; thence S52°12'20"E 1025.94 feet; thence S4°0'E 263.00 feet; thence S54°0,W 93.00 feet; then S44°24'W 439.21 feet; thence along the centerline of Beach Drive on the following courses: N73°41'50"W 368.52 feet and N73°15'W 290.00 feet; thence N9°46'50"E 1088.34 feet to the Place of Beginning, containing 17.83 acres, more or less,

which includes Units 90 through 104 of Harbor Cove Phase II, Emmet County Condominium Subdivision Plan No. 19, as recorded in the Emmet County records, and amendments thereto, and Units 105 through 113 of Harbor Cove Phase III, Emmet County Condominium Subdivision Plan No. 49, as recorded in the Master Deed of Harbor Cove Phase III in Liber 344, 901-939, Emmet Records, pursuant to a deed dated July 12, 1978, recorded on July 14, 1978, in Liber 286, Pages 527, Emmet County Records (the "Property"), is hereby **AMENDED** to provide that the constructive trust imposed against the Property is limited solely to Rosemary's interest in the Property not included in her bankruptcy estate.

IT IS FURTHER ORDERED that for the reasons stated in the Court's December 14, 1998, Opinion and the Court's Opinion entered this date, Plaintiffs are entitled to summary judgment against Rosemary Butcher and a constructive trust in accordance with 'the terms of the Court's December 14, 1998, Order, as amended by this Order, is

imposed upon Rosemary's non-bankruptcy interest in the Property.

IT IS FURTHER ORDERED that a certified copy of this Order shall be filed in the Emmet County real property records to evidence the state of title in the Property.

This case is terminated.

Dated: MARCH 10, 1999

/s/_____
GORDON J. QUIST
UNITED STATES DISTRICT JUDGE

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

[Filed March 10, 1999]

No. 1:91-CV-979

JOBST W.F. BLACHY, et al.,
Plaintiffs,

v.

ROBERT BUTCHER, et al.,
Defendants.

HON. GORDON J. QUIST

OPINION

The Court has before it the following: (1) Motion of all Defendants, except the United States (the "Butcher Defendants"), for reconsideration of the Court's Opinion and Order dated December 14, 1998; (2) the Butcher Defendants' supplemental motion for reconsideration of the Court's December 14, 1998, Opinion and Order; (3) the United States' Motion to Alter or Amend or at Least to Clarify the Opinion and Order dated December 14, 1998; and (4)

Correspondence from Plaintiffs' counsel dated January 5, 1999, which the Court will deem Plaintiffs' response to the Butcher Defendants' motion for reconsideration. For the reasons stated below, the Court will deny the Butcher Defendants' motion and supplemental motion for reconsideration and grant and deny in part the United States' motion to alter, amend, or clarify.

I. Supplemental Motion for Reconsideration

The Court will first address the Butcher Defendants' supplemental motion for reconsideration because it relates to the February 1, 1999, Order for service on Rosemary Butcher, which the Court issued in response to the motion for reconsideration. In their motion for reconsideration, the Butcher Defendants argue that the Court's December 14, 1998, Opinion and Order were not binding on Rosemary because she was not yet a defendant in this action and, therefore, the Court was without personal jurisdiction over her. The Court agreed and issued its February 1, 1999, Order for service. The Butcher Defendants contend in their supplemental motion that Rosemary should be relieved from the Court's December 14, 1998, Order because the Court had no authority to assert personal jurisdiction over Rosemary after entering a final Order. The other Butcher Defendants argue that they are entitled to relief from the Court's December 14, 1998, Order because they had no interest in the property.

The Court rejects both arguments. With regard to Rosemary's argument, the December 14, 1998, Order was not a final order that deprived the Court of jurisdiction because the Butcher Defendants' motion for reconsideration

affected the finality of the Court's Order. Such a "motion eliminates the finality of, and reopens, the earlier judgment." 12 James Wm. Moore et al., *Moore's Federal Practice* § 59.32[1] (3d ed. 1998). Thus, because the Order was not final, the Court had the authority to subject Rosemary to its jurisdiction by ordering that Rosemary be served with process. Moreover, Rosemary was added as a defendant because Alexander's interest in the property, which is the subject of this suit, was transferred to her during the course of this litigation. Thus, under Fed. R. Civ. P. 25(c), Rosemary was properly added as a defendant. "Rule 25(c) 'does not require that anything be done after an interest has been transferred.'" *Luxliner P.L. Export, Co. v. RDI/Luxliner, Inc.*, 13 F.3d 69, 71 (3d Cir. 1993)(quoting 7C Wright, Miller & Kane, *Federal Civil Procedure* § 1958 at 555 (2d ed. 1986)). Furthermore, "[a]lthough substitution [under Rule 25(c)] is usually effected during the course of litigation, substitution has been upheld even after litigation has ended as long as the transfer of interest occurred during the pendency of the case." *Id.* Thus, despite her protestations, Rosemary could have been added as a defendant even after this case is closed.

The Court also rejects the other Butcher Defendants' argument that they are entitled to relief from the Court's Order on the basis that they do not have any interest in the property. A constructive trust over all the Butcher Defendants was proper because they were involved in the acts and transactions that gave rise to the need for a constructive trust.

Therefore, they were properly named as defendants over whom a constructive trust should be imposed.[1]

II. Motion for Reconsideration

In its February 1, 1999, Order, the Court also required Rosemary to file a brief addressing why a constructive trust should not be imposed over her interest in the property in accordance with the Court's prior Opinion and Order. Therefore, the Court will treat the arguments raised by Rosemary in her brief as her response to Plaintiffs' motion for summary judgment to the extent that she has raised any new arguments that were not raised by the other Butcher Defendants in response to Plaintiffs' motion.

A. Subject Matter Jurisdiction

Most of Rosemary's and the other Butcher Defendants' arguments regarding subject matter jurisdiction were addressed by the Court in its previous opinion and require no substantial discussion. For example, the Butcher Defendants argue that the Court lacks subject matter jurisdiction over the action because Plaintiffs are attempting to enforce prepetition claims against property that Rosemary acquired postpetition from Alexander. The Butcher Defendants raised the same argument in response to Plaintiffs' motion and the Court rejected it on the basis that Plaintiffs are

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[1] Rosemary's request in the supplemental motion for additional time to file her brief in opposition to Plaintiffs' motion for summary judgment is moot, as Rosemary has since filed her brief.

not attempting to enforce debts against the property, but rather are seeking to impose a constructive trust on the property interest that Rosemary received from Alexander. Plaintiffs do not contend that Rosemary owes them a debt. The Court rejected the argument in a footnote. *See Blachy v. Butcher,* No. 1:91-CV-979, slip op. at 12 n.3 (W.D. Mich. 1998). The Butcher Defendants have not presented any basis to persuade this Court that it was wrong.

One of the few new arguments presented by Rosemary is that the Court lacks subject matter jurisdiction because the Sixth Circuit has exclusive jurisdiction based upon the Butcher Defendants' appeal. The argument assumes that the December 19, 1998, Order was final. As discussed above, the Order was not final because the Butcher Defendants and the United States filed motions for reconsideration and to alter or amend, which affected the finality of the Order. Both motions were pending at the time the appeal was filed. Thus, the Butcher Defendants' appeal was premature.

Rosemary and the Butcher Defendants continue to assert that the Court is precluded from imposing a constructive trust upon the property because the property is part of Rosemary's bankruptcy estate. The Court rejected this same argument in its Opinion and Order and finds no basis to conclude that its analysis was wrong. The Butcher Defendants' persistence in making this argument is puzzling in light of their own assertion in the bankruptcy court that "[o]ne-half of the subject property was exempt from Debtor's bankruptcy estate under the provision of 11 U.S.C. § 522(b)(2)(B) because the deed of October 30, 1991, was not signed within six months of Debtor's March 1, 1991 filing date, and, [Alexander] did not die until December 26, 1991."

(Resp. of Rosemary C. Butcher, Debtor, to Trustee's Mot. for Summ. J. at 2, ¶ 4, Pls.' Br. Opp'n Butcher Defs.' Mot. Summ. J. Ex. Z.) Furthermore, the cases which the Butcher Defendants cite for the proposition that all entireties property goes into a debtor's bankruptcy estate do not hold that a non-debtor's spouse interest in entireties property is included in the estate, nor do they support the Butcher Defendants' argument that the interest Rosemary received from Alexander either by quitclaim deed or upon his death 180 days after Rosemary filed bankruptcy is a part of Rosemary's bankruptcy estate.[2]

B. Effect of Void Deeds

Rosemary complains because this Court and Judge Shapero in his opinion refused to address the Butcher Defendants' contention that because the deeds which Plaintiffs obtained from LTDC and HCDC were void, Plaintiffs have no claim arising out of those deeds. Rosemary contends that Plaintiffs' deeds were void because they were not signed by Rosemary and Alexander. The argument is rejected. The deeds were signed by LTDC and HCDC, from whom Plaintiffs purchased the property. The Butcher Defendants have cited no case which would render the deeds void under these circumstances. Indeed, such a holding would affect the

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[2] The Butcher Defendants cite *In re Ford*, 3 B.R. 559 (Bankr. Md. 1980); *Lasich v. Estate of Wickstom (In re Wickstrom)*, 113 B.R. 339 (Bankr. W.D. Mich. 1990); *Liberty State Bank & Trust v. Grosslight (In re Grosslight)*, 757 F.2d 773 (6th Cir. 1985); and *Arango v. Third Nat. Bank in Nashville (In re Arango)*, 992 F.2d 611 (6th Cir. 1993).

validity of doctrines such as after acquired title. *See Jacobsen v. Nieboer,* 299 Mich. 116, 132, 299 N.W. 830, 834-35 (1941). Furthermore, in a case such as this, where a defendant obtains title to property under circumstances which are inequitable, the law will not permit the defendant to set up the statute of frauds as a defense in order to escape the remedy of a constructive trust. *See Kent v. Klein,* 352 Mich. 652, 656-57, 91 N.W.2d 11, 14 (1958)(en banc); *Kren v. Rubin,* 338 Mich. 288, 294-95, 61 N.W.2d 9, 12 (1953)(en banc).

C. Failure to Substitute Alexander

Rosemary and the other Butcher Defendants argue that Plaintiffs' claim against the interest of Alexander Butcher has been barred since approximately March 6, 1992, under Fed. R. Civ. P. 25(a) because the Order substituting Alexander's personal representatives into the suit was entered on February 4, 1994, more than 90 after the suggestion of Alexander's death was filed. Rule 25(a)(1) provides, in pertinent part, that

> If a party dies and the claim is not thereby extinguished, the court may order substitution of the proper parties . . . . Unless the motion for substitution is made not later than 90 days after the death is suggested upon the record by service of a statement of the fact of the death as provided herein for the service of the motion, the action shall be dismissed as to the deceased party.

Fed. R. Civ. P. 25(a)(1). The suggestion of Alexander's death was filed on or about January 2, 1992. On January 21, 1992,

Judge Gibson, of this district, entered an order staying this action. *See Blachy v. Butcher,* No. 1:91-CV-979, slip op. at 11 (W.D. Mich. Aug. 16, 1993). In his opinion and order issued on August 16, 1993, Judge Gibson held that the stay order tolled the 90 day period under Rule 25(a)(1) and that the 90 day period would remain tolled until the date of the transfer of the file to the Bankruptcy Court for the Eastern District of Michigan was complete. *See id.* at 11-12. Given that the order for substitution of the personal representatives of Alexander's estate was entered on February 4, 1994, the substitution was timely under Rule 25(a)(1) pursuant to Judge Gibson's order.

The Butcher Defendants' reliance upon *Anderson v. Yungkau,* 329 U.S. 482, 67 S. Ct. 428 (1947) is misplaced. *Anderson* was decided under the pre-1963 version of Rule 25(a). The version of Rule 25 then in effect provided that "'[i]f substitution is not [ ] made [within 2 years after death], the action shall be dismissed as to the deceased party.'" *Anderson,* 329 U.S. at 484, 67 S. Ct. at 429. The Court held that the use of the word "shall" in the rule required courts to dismiss an action against a deceased party if a motion for substitution had not been made within the two year period. *See id.* at 485-86, 67 S. Ct. at 430. The Court also held that the two year period for moving to substitute under Rule 25(a)(1) could not be extended under Fed. R. Civ. P. 6(b). *See id.*

Anderson is not controlling, however, because Rules 6(b) and 25(a)(1) were amended in 1963 to alleviate the harsh effects of decisions such as *Anderson* which interpreted Rule 25(a)(1) in a rigid manner. *See Al-Jundi v. Estate of Rockefeller,* 757 F. Supp. 206, 208 (W.D.N.Y. 1990)(mem.

op.). The Advisory Committee's Notes to the 1963 Amendments indicate that the revisions were intended to allow courts to extend the 90 day period in Rule 25(a)(1) pursuant to amended Rule 6(b). *See* Fed. R. Civ. P. 6, 25, advisory committee's notes. In addition, in more recent decisions, courts have upheld extensions of the 90 day period made pursuant to Rule 6(b). *See Continental Bank, N.A. v. Meyer*, 10 F.3d 1293, 1297 (7th Cir. 1993)(noting that "[w]hile couched in mandatory terms, the Advisory Committee Notes to Rule 25 indicate that the 90-day requirement may be extended by Federal Rule of Civil Procedure 6(b)"). Apart from the 1963 Amendment, *Anderson* also has no application in this case because Judge Gibson issued a stay order before the 90 day period expired which tolled the running of the time for substitution. In light of the stay order, the substitution was accomplished within the 90 day period. No such order was entered in *Anderson*.

D. Statute of Limitations

Rosemary raises the same arguments that the other Butcher Defendants previously raised regarding the statute of limitations. The Court rejects those arguments again for the reasons stated in its previous opinion. Rosemary also contends that Plaintiffs' claim against her is barred by the statute of limitations because Plaintiffs did not file their claim against her within the applicable statute of limitations. Rosemary asserts that, "[i]n effect, plaintiffs have filed or are attempting to file a new suit against Debtor for the property interest they claim she acquired postpetition." (Butcher Defs.' Mot. at 12.) In its December 14 Opinion and Order, the Court found that suit was timely brought within either the 15 year limitations period under M.C.L. § 600.5801(4) or the ten year period

under M.C.L. § 600.5807(4). *See Blachy v. Butcher,* No. 1:91-CV-979, slip op. at 14-16 (W.D. Mich. Dec. 14, 1998).

Rosemary's contention must be rejected because Rule 25(c) permits Plaintiffs' amendment to add Rosemary without running afoul of the statute of limitations. Rule 25(c) provides:

> **Transfer of Interest.** In case of any transfer of interest, the action may be continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party. Service of the motion shall be made as provided in subdivision (a) of this rule.

Fed. R. Civ. P. 25(c). As the Rule indicates, it allows substitution or joinder of a party to whom a transfer occurs after the litigation is commenced. *See Andrews v. Lakeshore Rehabilitation Hosp.*, 140 F.3d 1405, 1407 (11th Cir. 1998).

> Rule 25 does not substantively determine what actions survive the transfer of an interest; rather, it provides substitution procedures for an action that does survive. The rule expressly permits parties to continue in an action, even if they do not remain the real party in interest, as long as the cause of action itself survives the transfer to the new party.

ELCA Enter. v. Sisco Equip. Rental & Sales, Inc., 53 F.3d 186, 191 (8th Cir. 1995)(italics in original)(citing *Hilbrands*

v. Far East Trading Co., 509 F.2d 1321, 1323 (9th Cir. 1975)). In addition, unlike Rule 25(a), there is no time under Rule 25(c) within which a party must move for substitution or joinder of the transferee of an interest.

Plaintiffs sought to add Rosemary as a party not because they had an independent claim against her which predated the filing of their original complaint, but because she received Alexander's interest in the property after the date this case was commenced. Although Plaintiffs did not cite Rule 25(c) in their motion to amend and the Magistrate Judge did not expressly refer to that Rule, "the fact that the motion did not implicate Rule 25(c) on its face is irrelevant." *Concord Boat Corp. v. Brunswick Corp.*, 21 F. Supp. 2d 923, 938 (E.D. Ark. 1998)(finding that the import of Plaintiffs' motion to substitute two successor corporations was clearly to seek substitution of successors in interest for the then-existing plaintiffs). The addition of Rosemary as a defendant in this case based upon her receipt of Alexander's interest after this case was filed squarely fits within Rule 25(c)'s requirements. Thus, Plaintiff's claim against Rosemary is simply a continuation of their claim against Alexander and is not barred by the statute of limitations.

E. Scope of Prior Order

The Butcher Defendants' final argument is that the Court's Order improperly imposed a constructive trust over all of the property, including the property included in Rosemary's bankruptcy estate. The United States has raised the same argument in its motion to alter, amend, or clarify the Order. The Court agrees with both the Butcher Defendants' and the United States that its December 14 Order was

overbroad to the extent that it attempted to impose a constructive trust over Rosemary's interest in the property included in her bankruptcy estate. Thus, the Court will issue an amended order clarifying the scope of the constructive trust.

III. Motion to Alter or Amend or at Least to Clarify

In addition to the issue cited above regarding the scope of the Court's Order, the United States asks the Court to clarify whether it intended to make a finding of fraud by Alexander. For purposes of clarification, the Court did not find that the evidence demonstrated, for summary judgment purposes, that Alexander engaged in fraud. Nonetheless, as stated in the Court's Opinion, it nonetheless found that imposition of a constructive trust was proper under Michigan law. Because the Opinion does not expressly contain a finding of fraud, the Court finds it unnecessary to clarify the Order.

The United States also requests the Court to clarify that its statements referring to "Defendants' arguments" as "without merit" or "specious" at pages 8, 14, 18, and 19 n.7, of its Opinion referred to arguments made by the Butcher Defendants and not the United States. The Court disagrees with counsel for the United States that a reader of the Court's Opinion might interpret its references to Defendants' arguments as being "without merit" or "specious" included the arguments made by the United States. Nonetheless, for purposes of clarification, such references were to arguments raised by the Butcher Defendants rather than the United States.

Conclusion

For the foregoing reasons, the Court will grant in part and deny in part the Butcher Defendants' motion for reconsideration, deny the Butcher Defendants' supplemental motion for reconsideration, and grant in part and deny in part the United States' Motion to Alter or Amend or at Least to Clarify. The Butcher Defendants' motion will be granted only as to the scope of the constructive trust and denied with respect to all other grounds. The United States' motion will be granted with respect to the scope of the constructive trust and with respect to references of Defendants' arguments as being either "without merit" or "specious."

An Order amending the December 14, 1998, Order consistent with this Opinion will be entered.

Dated: MARCH 10, 1999

/s/_____
GORDON J. QUIST
UNITED STATES DISTRICT JUDGE

APPENDIX G

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

[Filed December 14, 1998]

No. 1:91-CV-979

JOBST W.F. BLACHY, et al.,
Plaintiffs,

v.

ROBERT BUTCHER, et al.,
Defendants.

HON. GORDON J. QUIST

OPINION

In this case, Plaintiffs have sued Defendants to quiet title to certain condominium interests which Plaintiffs or their predecessors-in-interest purchased from Defendants Little Traverse Development Co. and H.C. Development Co. during the early to mid-1980s. Lawyers Title Insurance Corporation ("Lawyers Title"), which insured the titles to the condominium units, is also a plaintiff in this case. Plaintiffs named the Internal Revenue Service ("Government" or "IRS")

as a defendant because it filed Notices of Federal Tax Lien against the condominium units. Now before the Court are Plaintiffs' and Defendants' cross motions for summary judgment on Plaintiffs' constructive trust claim.

Facts

On June 30, 1978, Cedar Cove, a Michigan limited partnership, conveyed certain real property, described as four separate parcels located in Little Traverse Township, Emmet County, Michigan, to Alexander M. Butcher and Rosemary G. Butcher (individually "Alexander" and "Rosemary" and collectively the "Butchers"), for the price of $640,000.00. The property consisted of approximately 100 acres. By warranty deed dated July 6, 1978, the Butchers conveyed two of the four parcels, one consisting of approximately 36.65 acres and the other of approximately 4.16 acres, to Little Traverse Development Co. ("LTDC"), a Michigan corporation owned solely by Alexander.[1]

On July 11, 1978, LTDC obtained construction loans from City National Bank of Detroit, n/k/a First of America Bank, in the amounts of $1,180,000 and $1,380,000, which were secured by mortgages covering approximately 18.37 acres of the 35.65 acre parcel. The June 30, 1978, warranty deed from Cedar Cove to the Butchers, the July 6, 1978,

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[1] The July 6, 1978, warranty deed shows that the sum of "Five Hundred Forty Thousand and no/100 ($540,000.00) Dollars," which was apparently originally typed in as the amount of consideration, was subsequently stricken and replaced with the language "[n]o revenue stamps required (207.505(1) [sic]." (See July 6, 1978, Warranty Deed, Pls.' Br. Supp. Ex. C.)

warranty deed from the Butchers to LTDC, LTDC's assumption of Cedar Cove's mortgage, and the mortgages from LTDC to City National Bank of Detroit were recorded on July 12, 1978, with the Emmit County Register of Deeds. That same day, Alexander signed a deed in his capacity as President of LTDC, conveying the unmortgaged portion of the 36.65 acre parcel, consisting of about 17.83 acres (the "17.83 acres"), to the Butchers for $ 1.00. The deed was recorded on July 14, 1978. At Alexander's request, Lawyers Title issued a revised title commitment on July 18, 1978. Due to the fact that the July .12, 1978, warranty deed was submitted for recording only days earlier, Lawyers Title did not discover the conveyance from LTDC to the Butchers, and Alexander did not inform Lawyers Title about the conveyance.

Alexander executed a Master Deed dated November 1, 1978, on behalf of LTDC, which created a condominium project called Harbor Cove Phase II ("Phase II") that included the 17.83 acres. From 1981 through 1984, LTDC constructed and sold condominiums in Phase II on the 17.83 acres, nine of which were sold to Plaintiffs or their successors-in-interest.

On May 8, 1984, Alexander formed H.C. Development Company ("HCDC"), in which he was majority stockholder, president, and a director. On October 23, 1984, Alexander signed a warranty deed on behalf of LTDC purporting to convey to HCDC approximately 12.60 of the 17.83 acres. On November 7, 1984, Alexander, as president of HCDC, signed a Master Deed creating Harbor Cove Phase III ("Phase III") on the 12.60 acres. On November 8, 1984, Alexander, as president of HCDC, granted a mortgage to Northwestern Savings and Loan Association on the Phase III

property to secure a construction loan in the amount of $1.3 million. Lawyers Title issued a commitment dated November 7, 1984, for the transaction. HCDC subsequently constructed and sold condominiums on the Phase III property to some of the Plaintiffs in this case and other purchasers.

In some of the deeds conveying the condominium units to Plaintiffs, Alexander, acting as president of either LTDC or HCDC, represented that LTDC or HCDC held title to the 17.83 acres. Alexander stated under oath on at least ten occasions in connection with LTDC's requests for construction draws from CNBD that LTDC was the owner of the Phase II property. Alexander also stated under oath on several occasions on behalf of HCDC in connection with its request for construction draws that HCDC was the owner of the Phase III property. In addition, on January 28, 1987, HCDC agreed to convey six of the Phase III units to Northwestern Savings and Loan Association in lieu of foreclosure in satisfaction of a $937,306.76 default on the construction loan.

The Butchers did not claim to own an interest in the 17.83 acres until after Rosemary filed a Chapter 7 bankruptcy petition in the United States Bankruptcy Court for the Eastern District of Michigan on March 1, 1991. Prior to that time, the Butchers had not paid taxes on the 17.83 acres and had confirmed in numerous documents that either LTDC or HCDC owned the 17.83 acres. Furthermore, in connection with an appeal from a conviction in a mail fraud case, Alexander submitted a financial affidavit in which he attested under oath that he owned no real property.

Procedural History

On October 16, 1991, Lawyers Title and the condominium owners to whom Lawyers Title issued title insurance policies sued Alexander, LTDC, HCDC, and the IRS in Emmet County Circuit Court. Plaintiffs did not sue Rosemary because she was under the protection of the bankruptcy court. However, on February 11, 1992, Plaintiffs filed an adversary proceeding against Rosemary in her bankruptcy case. Plaintiffs sought the imposition of a constructive trust in both cases. The IRS removed the Emmet County case and Judge Benjamin Gibson transferred venue to the Eastern District of Michigan Bankruptcy Court as another adversary proceeding.

Although Rosemary did not list the Property as an asset in her original petition, she subsequently amended the schedules to include the Property after being ordered to do so by bankruptcy Judge Walter Shapero. On or about October 30, 1991, Alexander quit claimed all of his interest in the property to Rosemary. Alexander died on December 26, 1991, and Judge Shapero issued an order substituting the co-personal representatives of Alexander's estate, Rosemary and Robert E. Butcher (Defendants' counsel), for Alexander. Judge Shapero also consolidated the two adversary proceedings.

On January 18, 1995, Judge Shapero granted Plaintiffs' motion for summary judgment and imposed a constructive trust over the Property for the condominium owners' benefit. *See Blachy v. Butcher* (*In re Butcher*), Nos. 92-0173, 93-4819, slip op. at 14, 27 (Brktcy. E.D. Mich. Nov. 21, 1994). Judge Shapero also found that the

constructive trust pre-dated the I.R.S. liens filed in 1987, 1988, 1989, and 1990. *See id.* at 25. Defendants appealed the order to the district court, and on July 31, 1995, Judge Lawrence Zatkoff issued an order reversing Judge Shapero's January 18, 1995, order on the grounds that under the Sixth Circuit's decision in *XL/Datacomp. Inc. v. Wilson (In re Omegas Group, Inc.),* 16 F.3d 1443 (6th Cir. 1994), a bankruptcy court may not impose a constructive trust over property of the estate. *See Butcher v. Blachy,* Nos. 95-CV-70325-DT, slip op. at 4-6 (E.D. Mich. July 31, 1995). Judge Zatkoff concluded that under *In re Omegas*, the remedy provided by the Bankruptcy Code was to have the debt declared nondischargeable, and he remanded the case to the bankruptcy court for further proceedings. *See id.* at 5-6.

On April 7, 1997, Judge Shapero entered an order abstaining from further consideration of the constructive trust claims because he felt that a constructive trust was still the appropriate remedy. On January 20, 1998, Judge Shapero transferred venue over Count I of the adversary proceeding against Alexander's estate back to this Court and lifted the automatic stay against Rosemary to permit Plaintiffs to add Rosemary as a defendant and add a fraudulent conveyance count against the Butchers. On October 26, 1998, Magistrate Judge Hugh Brenneman Jr. granted Plaintiffs' motion for leave to amend their complaint to add Rosemary as a defendant and add an additional claim for fraudulent conveyance against the Butchers.

Summary Judgment Standard

Summary judgment is appropriate if there is no genuine issue as to any material fact and the moving party is

entitled to a judgment as a matter of law. Fed. R. Civ. P. 56. The rule requires that the disputed facts be material. Material facts are facts which are defined by substantive law and are necessary to apply the law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 2510 (1986). A dispute over trivial facts which are not necessary in order to apply the substantive law does not prevent the granting of a motion for summary judgment. *Id.* at 248, 106 S. Ct. at 2510. The rule also requires the dispute to be genuine. A dispute is genuine if a reasonable jury could return judgment for the non-moving party. *Id.* This standard requires the non-moving party to present more than a scintilla of evidence to defeat the motion. *Id.* at 251, 106 S. Ct. at 2511 (citing *Improvement Co. v. Munson*, 14 Wall. 442, 448, 20 L. Ed. 867 (1872)).

A moving party who does not have the burden of proof at trial may properly support a motion for summary judgment by showing the court that there is no evidence to support the non-moving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324-25, 106 S. Ct. 2548, 2553-54 (1986). If the motion is so supported, the party opposing the motion must then demonstrate with "concrete evidence" that there is a genuine issue of material fact for trial. *Id.*; *Frank v. D'Ambrosi*, 4 F.3d 1378, 1384 (6th Cir. 1993). The court must draw all inferences in a light most favorable to the non-moving party, but may grant summary judgment when "the record taken as a whole could not lead a rational trier of fact to find for the non-moving party." *Agristor Financial Corp. v. Van Sickle*, 967 F.2d 233, 236 (6th Cir. 1992) (quoting *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 1356 (1986)).

Discussion

I. Standing and Jurisdiction

Before addressing Plaintiffs' request for imposition of a constructive trust, the Court will address Defendants' arguments that Plaintiffs lack standing and that this Court does not have jurisdiction over Plaintiffs' constructive trust claim. Defendants first contend that Plaintiffs lack standing to maintain a claim for imposition of a constructive trust. Defendants' standing argument is actually a conglomeration of many different arguments, each of which lacks merit.[2]

Defendants argue that Plaintiffs lack standing because they were not parties to the July 12, 1978, warranty deed from LTDC to the Butchers, they were not creditors of the Butchers, and Lawyers Title did not insure that conveyance. Defendants also argue that Plaintiffs have no standing to seek

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[2] One such argument, which does not merit any significant substantive review, is that Lawyers Title is barred from seeking relief to resolve the purchasers' title problems by M.C.L. § 450.681, which prohibits the unauthorized practice of law by corporations, and M.C.L. § 500.7304, which prohibits the unauthorized practice of law by title insurance companies. Neither section applies because Lawyers Title is represented in this case by attorneys, who also happen to represent the purchasers. The purchasers were named as plaintiffs pursuant to the title insurance policies, which permit Lawyers Title to take any legal action necessary to obtain clear title for the purchasers. Thus, Lawyers Title is simply attempting to fulfill its obligations under the title policy by providing the purchasers clear title to the condominium units they purchased.

a constructive trust for the benefit of LTDC and HCDC because the corporations did not consent to such relief. Further, Defendants argue that the condominium purchaser Plaintiffs have no standing to assert their claim because they relied upon and received title commitments from Lawyers Title and will not sustain any loss because they will be indemnified by Lawyers Title.

To establish Constitutional standing, a plaintiff must establish three elements: "(1) an 'injury in fact' that is concrete and particularized; (2) a connection between the injury and the conduct at issue - the injury must be fairly traceable to the defendant's action; and (3) likelihood that the injury would be redressed by a favorable decision of the Court." *Southwestern Pa. Growth Alliance v. Browner,* 144 F.3d 984, 988 (6th Cir. 1998) (citing *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61, 112 S. Ct. 2130, 2136 (1992)); *see also Peoples Rights Org. v. City of Columbus,* 152 F.3d 522, 527 (6th Cir. 1998). A plaintiff must also show the "existence of an actual case of controversy." *Citizens for Legislative Choice v. Miller,* 144 F.3d 916, 920 (6th Cir. 1998). Plaintiffs clearly meet all of the requirements for standing. Plaintiffs have alleged and shown an injury in fact, namely, defective titles to the condominiums which they purchased from LTDC and HCDC. The injuries are traceable to the Butchers' conduct in exercising control over LTDC through the execution and delivery of the July 12, 1978, warranty deed conveying title to the 17.83 acres to the Butchers. The entire point of Plaintiffs' suit is that a cloud exists on their title by reason of the July 12, 1978, warranty deed. Thus, Alexander and Rosemary, by virtue of the interests she obtained through the July 12, 1978, warranty deed and the October 30, 1991, quit claim deed from

Alexander, have a substantial connection to the injuries which Plaintiffs have suffered. Finally, a favorable ruling from this Court, i.e., imposition of a constructive trust, would remove the cloud from Plaintiffs' titles and relieve Lawyers Title of its indemnity obligations under its policies. Thus, it is irrelevant that the Plaintiff purchasers were not parties to the July 12, 1978, warranty deed, that Lawyers Title did not insure that conveyance, or that Plaintiffs are not creditors of the Butchers, because the relief sought in this case will provide a remedy to all Plaintiffs for the harm caused by the July 12, 1978, warranty deed.

Defendants' argument that Lawyers Title does not have standing to bring this action ignores the provision in the policies which permits Lawyers Title to remedy title defects for its insureds. The policies provide that

> [Lawyers Title] shall have the right, at its own cost, to institute and prosecute any action or proceeding or to do any other act which in its opinion may be necessary or desirable to establish the title to the estate or interest as insured or to prevent or reduce loss or damage to the insured. [Lawyers Title] may take any appropriate action under the terms of this policy, whether or not it shall be liable hereunder . . . .

(Policy No. 113-00-437585, Conditions and Stipulations ¶ 4(b), attached to Pls.' Br. Opp'n as Ex. J.) Pursuant to its contractual agreement with the purchasers to insure marketable title, Lawyers Title is entitled to pursue a claim against the Butchers to establish title to the property in

conformity with the policies. Thus, while Defendants would no doubt prefer that the purchasers seek indemnity under the title policies rather than clear title through their instant claim, no legal principle precludes Lawyers Title or the purchasers from pursuing a constructive trust remedy.

Defendants also assert that the Court lacks jurisdiction because none of the Defendants has an interest in the property over which Plaintiffs seek a constructive trust. Defendants point out that neither LTDC nor HCDC has any interest in the property and that neither Alexander, nor his estate, has any separate interest in the property. Instead, Defendants argue, the October 31, 1991, quit claim deed from Alexander to Rosemary of his interest in the property destroyed the tenancy by the entireties and left Rosemary with sole title to the property.

Defendants are correct that under Michigan law, a conveyance of an entireties interest by one spouse to the other terminates the entireties interest. *See* M.C.L. § 557.101. To the extent Defendants are contending that no Defendant in this case possesses an interest in the property, however, the argument is without merit. Defendants acknowledge that Rosemary received Alexander's interest in the property under the October 30, 1991, quit claim deed. Pursuant to Magistrate Judge Brenneman's October 26, 1998, order, Plaintiffs have filed a first amended complaint naming Rosemary as a defendant. Thus, Rosemary is a party who holds an interest

in the property that may be subjected to a constructive trust.[3]

Defendants also argue that the Court has no jurisdiction over Plaintiffs' constructive trust claim because Rosemary's interest in the property is under the jurisdiction of the bankruptcy court. This argument is also without merit. Plaintiffs are not seeking imposition of a constructive trust on Rosemary's interest in her bankruptcy estate, which is subject to the bankruptcy court's jurisdiction, but rather on the interest which she received from Alexander either though the October 31, 1991, quit claim deed or as a result of his death in December 1991, after her bankruptcy case was commenced. The interest that Rosemary held in the property as a tenant by the entireties on March 1, 1991, became property of the bankruptcy estate. *See* 11 U.S.C. § 541(a)(1) (stating that the property of the estate includes "all legal or equitable interests of the debtor in property as of the commencement of the case"). Under § 541(a)(5)(A), any property interest which the debtor acquires "by bequest, devise, or inheritance" within 180 days after the petition is filed also becomes property of the estate. 11 U.S.C.

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[3] Defendants also suggest that the interest Rosemary received from Alexander is exempt from the relief Plaintiffs seek because Rosemary is not liable for Alexander's debts. It is true that under Michigan law a creditor of one spouse cannot reach property that is held by the entireties. *See Craft v. United States*, 140 F.3d 638, 642 (6th Cir. 1998). However, Defendants' argument misses the point. At least with respect to their constructive trust claim, Plaintiffs do not contend that they are creditors of either Alexander or Rosemary, nor are they seeking to enforce a debt against the property. They seek the remedy of a constructive trust over the non-bankruptcy interest held by Rosemary.

§ 541(a)(5)(A). Rosemary obtained her interest from Alexander after she filed her petition and, although § 541(a)(5)(A) appears inapplicable to the manner in which Rosemary received her interest from Alexander, beyond the 180 day period set forth in § 541(a)(5)(A). Thus, the interest that Rosemary received from Alexander is not part of the estate subject to the bankruptcy court's jurisdiction. In fact, in the bankruptcy court proceedings, Defendants acknowledged that Rosemary holds a separate, non-bankruptcy interest when they stated, "[o]ne-half of the subject property was exempt from Debtor's bankruptcy estate under the provision of 11 U.S.C. § 522(b)(2)(B) because the deed of October 30, 1991, was not signed within six months of Debtor's March 1, 1991 filing date, and, [Alexander] did not die until December 26, 1991."[4] (Resp. of Rosemary C. Butcher, Debtor, to Trustee's Motion for Summary Judgment at 2, ¶ 4, attached to Pls.' Br. Opp'n as Ex. Z.)

II. Statute of Limitations

Defendants also argue that Plaintiffs' claim is barred by the applicable statute of limitations. This argument is also without merit. The period of limitations for actions for the recovery or possession of lands is set forth in M.C.L. § 600.5801, which provides that:

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[4] Although not raised by Plaintiffs, Defendants may be judicially estopped by their prior arguments in the bankruptcy court from arguing that Rosemary does not possess a separate interest not subject to the bankruptcy court's jurisdiction. *See Teledyne Indus., Inc. v. NLRB*, 911 F.2d 1214, 1217-18 (6th Cir. 1990).

> No person may bring or maintain any action for the recovery or possession of any lands or make any entry upon any lands unless, after the claim or right to make the entry first accrued to himself or to someone through whom he claims, he commences the action or makes the entry within the periods of time prescribed by this section.
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>
> (4) Other cases. In all other cases under this section, the period of limitation is 15 years.

M.C.L. § 600.5801. The fifteen year limitations period governs actions to quiet title. *See Gorte v. Department of Transp.*, 202 Mich. App. 161, 165, 507 N.W.2d 797, 799 (1993). In *Thomas v. Steuernol,* 185 Mich. App. 148, 460 N.W.2d 577, (1990) (per curiam), the court held that the five-year limitations period set forth in M.C.L. § 600.5801(1) for recovering real property interests under an executor's deed applied to the plaintiff's action to recover oil and gas lease interests. *See id.* at 152, 460 N.W.2d at 580. In this case, Plaintiffs seek to impose a constructive trust on Rosemary's non-bankruptcy interest in the Property in order to procure clear legal title to their condominium units. The suit is, in essence, a quiet title action. Therefore, the 15 year period set forth in M.C.L. § 600.5801(4) governs. Because the first deed was granted to Plaintiffs on October 22, 1981, Plaintiffs' suit, which was filed in state court on October 16, 1991, is within the limitations period.

Plaintiffs, suit was also filed in time even if the shorter ten year period set forth in M.C.L. § 600.5807(4) "for actions founded upon covenants in deeds and mortgages of real estate" applies. M.C.L. § 600.5807(4). As noted above, Plaintiffs filed their suit in state court less than ten years after the date LTDC conveyed the first deed. Defendants' contention that the accrual date of Plaintiffs claim was July 12, 1978 -- the date on which LTDC conveyed title to the Butchers -- is wrong, because Plaintiffs' claims did not accrue until Plaintiffs "first [became] entitled to the possession of the premises under the title upon which the [ ] action is founded." M.C.L. § 600.5829(5). Plaintiffs did not become entitled to possession of the condominium units until they received their warranty deeds from LTDC and HCDC, beginning on October 22, 1981.[5]

III. Propriety of Constructive Trust

The central issue before the Court is whether the facts at hand support the remedy of a constructive trust in favor of Plaintiffs. Under Michigan law,

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[5] Plaintiffs also contend that their complaint was filed in time even if the six year period for breach of contract under M.C.L. § 600.5805 applies, because the discovery rule applies. Plaintiffs assert that they discovered the conveyance to the Butchers in 1991 and filed suit that same year, but have not pointed to any specific evidence to support their claim. However, the evidence, which is not in dispute, shows that until 1991, the Butchers represented that they did not own the property and there is no indication that anyone else had knowledge of the July 12, 1978, deed prior to that time.

> [a] constructive trust may be imposed "where such trust is necessary to do equity or to prevent unjust enrichment . . . . " Hence, such a trust may be imposed when property "'has been obtained through fraud, misrepresentation, concealment, undue influence, duress, taking advantage of one's weakness, or necessities, or any other similar circumstances which render it unconscionable for the holder of the legal title to retain and enjoy the property . . . . '" Accordingly, it may not be imposed upon parties "who have in no way contributed to the reasons for imposing a constructive trust." The burden of proof is upon the person seeking the imposition of such a trust.

Kammer Asphalt Paving Co. v. East China Township Sch., 443 Mich. 176, 188, 504 N.W.2d 635, 641-42 (1993) (citations omitted).

In *Kren v. Rubin*, 338 Mich. 288, 61 N.W.2d 9 (1953) (en banc), the Michigan Supreme Court affirmed the trial court's judgment imposing a constructive trust upon the defendant, who agreed to purchase certain property from a third party for the plaintiffs but, after completing the purchase, failed to convey the entire parcel to the plaintiffs. *See id.* at 294, 61 N.W.2d at 12. The court concluded that the trial judge's appraisal of the evidence was not erroneous. In assessing the evidence the trial judge observed:

> "A very strong factor in this case, in my judgment, is a question of taxes. These

> people have continued on the tax rolls for the entire piece of property, and have paid the taxes during all this period of time, no effort being made by the defendant to have any changes made in the tax roll, or to assume the taxes for the portion which he retained."

Id. at 292-93, 61 N.W.2d at 11 (quoting trial court).

In *McCreary v. Shields*, 333 Mich. 290, 52 N.W.2d 853 (1952) (en banc), the plaintiff and her husband purchased property (Lot K) pursuant to a deed which mistakenly described the adjacent vacant parcel (Lot L). *See id.* at 291, 52 N.W.2d at 854. The plaintiff and her husband resided in the house on Lot K, but mistakenly paid the taxes on Lot L. *See* at 292, 52 N.W.2d at 855. Due to the delinquent tax status of Lot K, the State received title to Lot K through delinquency proceedings and conveyed the property to the defendant for $150. *See id.* The defendant admitted that she believed she had purchased a vacant lot, and the State had not attempted to collect rent from the plaintiffs. *See id.* at 293, 52 N.W.2d at 855. The trial court awarded Lot K to the plaintiff. In affirming, the Michigan Supreme Court stated, "[d]efendant [ ] has no just ground for complaint that she is not allowed to unjustly enrich herself out of the error common to all three parties . . . . " *Id.* at 294, 52 N.W.2d at 855. The court concluded that a constructive trust was a proper remedy to prevent the defendant's unjust enrichment. *See id.* at 294-95, 52 N.W.2d at 855-56.

Although actual fraud will certainly support the imposition of a constructive trust under Michigan law, it is not a prerequisite. "Fraud in the inception [is] not require[d],

nor deceit, nor chicanery in any of its valied [sic] guises, for it is not necessary that property be wrongfully acquired. It is enough that it is unconscionably withheld." *Kent v. Klein,* 352 Mich. 652, 657, 91 N.W.2d 11, 14 (1958) (en banc).

The facts in this case, which are not in dispute, establish beyond question that a constructive trust over the interest in the property which Alexander conveyed to Rosemary is both appropriate and necessary to prevent the Butchers from being unjustly enriched at Plaintiffs' expense. While the facts may not conclusively demonstrate fraud, Alexander's failure to inform Lawyers Title of the July 12, 1978, conveyance, which occurred shortly before Lawyers Title issued a title policy to LTDC, when Alexander was obviously aware of the conveyance, is a strong indication of fraud.[6] On July 12, 1978, the Butchers recorded warranty deeds conveying the property from Cedar Cove to the Butchers and from the Butchers to LTDC. That same day,

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[6] Defendants contend that Plaintiffs are not entitled to constructive trust relief because Lawyers Title was negligent in failing to discover the July 12, 1978, deed or knew about the deed but decided to insure over it. The argument fails because Defendants have not shown that Lawyers Title was aware of the July 12, 1978, deed prior to 1991 or that Lawyers Title had any reason to suspect that such a deed existed. The argument is especially unconvincing because Alexander, who was certainly in the best position to notify Lawyers Title of the deed, failed to do so and made many affirmative representations to Lawyers Title which directly contradicted the deed. Finally, Defendants have cited no case to the Court which would support a negligence defense under the circumstances in this case, where Defendants can offer no plausible reason why they should have title to the property.

Alexander, acting for LTDC, conveyed the portion of the property in dispute back to himself and Rosemary. From that point on, the Butchers, both individually and through LTDC or HCDC, represented to lenders, purchasers, the State of Michigan, and other parties that LTDC or HCDC owned the property. At the same time, the Butchers failed to disclose the existence of the July 12, 1978, warranty deed which they now claim gave them clear title. Finally, as in *Kren*, the Butchers permitted Plaintiffs to pay the taxes on the property for many years without ever claiming responsibility for the taxes.[7] Given these facts, this Court, like Judge Shapero, "can hardly imagine a more compelling case for the imposition of a constructive trust." *Blachy v. Butcher* (*In re Butcher*), Nos. 92-0173, 93-4819, slip op. at 12 (Bkrtcy. E.D. Mich. Nov. 21, 1994).

The Court also finds that the constructive trust should be imposed as of July 12, 1978, the date of the conveyance

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[7] Another of Defendants' specious arguments which merits no more than a footnote is that by furnishing title insurance policies to the purchasers of the condominium units, Defendants were somehow released from the relief which Plaintiffs now seek. While LTDC and HCDC may have complied with their statutory obligations under M.C.L. § 559.194 by furnishing title policies to the initial purchasers of the condominiums, Defendants have offered no evidence that Lawyers Title agreed to release Defendants from any claims. Moreover, if Defendants' argument had any merit at all, it would be tantamount to granting a license to engage in fraud on any title insurance company, or for that matter, *any* insurance company. Thus, so long as the unscrupulous seller is able to prevent an insurer from discovering another conveyance, the seller could double his profits by selling the property twice.

giving rise to the inequitable conduct. "The constructive trust is purely a remedial device, 'the formula through which the conscience of equity finds expression'" *Nelson v. Woodworth,* 363 Mich. 244, 250, 109 N.W.2d 861, 864 (1961) (en banc) (quoting *Beatty v. Guggenheim Exploration Co.,* 225 N.Y. 380, 386, 122 N.E. 378, 380 (1919)). "When the remedial device of the constructive trust is employed, chancery orders whatever conveyance will remedy the wrong suffered . . . ." *Kent,* 352 Mich. at 658, 91 N.W.2d at 15. The constructive trust remedy treats the beneficiary as the equitable owner of the property held in trust as of the date of the wrongful or inequitable act. *See McTevia v. Adamo (In re Atlantic Mortgage Corp.),* 69 B.R. 321, 328 (Bankr. E.D. Mich. 1987). Thus, such trusts may relate back to the time of the wrongful or inequitable act. *See id.* (finding that "[a]llowing a constructive trust to relate back is consistent with Michigan doctrine" and holding that a constructive trust would be imposed for investors who could show that the debtor improperly withheld possession of their promissory notes as of the date possession was first improperly withheld). Therefore, July 12, 1978, is the date on which the constructive trust arose.

IV. Effect of Constructive Trust on the I.R.S.'s Lien

The final issue which the Court must address is whether the constructive trust strips the I.R.S.'s lien, which arose after the date of the constructive trust. The I.R.S. contends that a constructive trust cannot be retroactively imposed to avoid federal tax liens which have attached to property in which the taxpayer has a voidable interest. In support of its position, the I.R.S. relies heavily on the case of *SEC v. Levine,* 881 F.2d 1165 (2d Cir. 1989). The Court has

reviewed the *Levine* case and agrees with Judge Shapero's assessment that *Levine* is distinguishable from the case at hand. While the district court in *Levine* did find that a constructive trust should be imposed on the profits which the defendants illegally obtained, the Second Circuit held that the district court erred because there was no judicial determination that the defendants had actually engaged in conduct that would support a constructive trust remedy. *See* 881 F.2d at 1174. The court noted that the district court's holding was based upon consent judgments in which "the defendants neither admitted nor denied any of the allegations of the civil complaints; and the judgments specified that they were consented to without admission or adjudication." *Id.* The court's alternative reasoning is not applicable in this case because the court did not address the effect of a constructive trust on federal tax liens. However, even though the court rejected the SEC's contention that the principal issue was the relationship between a constructive trust and federal tax liens, it acknowledged that "this might be a proper characterization of the issues if [it was] reviewing relief granted after adjudication . . . . " *Id.* at 1178.

The I.R.S. contends that a constructive trust cannot relate back to defeat a prior federal tax lien because only liens which are "choate," or properly perfected prior to the time the federal tax lien attaches, can prime a federal tax lien. The I.R.S. cites a number of cases involving the priority of federal tax liens over competing interests to support its position. However, while it is a correct statement of the law that only interests that are perfected, i.e., where nothing more remains to be done to enforce the lien, will prime federal tax liens, *see United States v. City of New Britain,* 347 U.S. 81, 84, 74 S. Ct. 367, 369 (1954), the cases which the I.R.S. cites are not

persuasive because they do not address the issue of whether a constructive trust that arises prior to the date of federal tax liens defeats such liens.

Pursuant to 26 U.S.C. § 6321, federal tax liens attach only to "property and rights to property" held by the taxpayer. 26 U.S.C. § 6321. In determining whether a tax lien attaches to property, state law governs the nature of the taxpayer's interest, while federal law controls the consequences of the state-created interest. *See United States v. National Bank of Commerce,* 472 U.S. 713, 722, 105 S. Ct. 2919, 2925 (1985). Thus, "'when attempting to establish its lien to property of a delinquent taxpayer'" the I.R.S. can "'never [have] better [rights] than those which the taxpayer had'" under state law. *Hobson v. United States,* 168 F. Supp. 117, 119 (W.D. Mich. 1958) (quoting 9 *Mertens Law of Federal Income Taxation* § 54.52).

In *FTC v. Crittenden,* 823 F. Supp. 699 (C.B. Cal. 1993), aff'd 19 F.3d 26 (9th Cir. 1994), the court imposed a constructive trust on certain funds that the defendant had improperly obtained from his customers through his business. The I.R.S. argued, inter alia, that it was entitled to first priority in the funds on the basis of its tax lien. The court rejected the argument, stating:

> The Court need not determine whether the IRS is entitled to statutory priority over the receivership funds because those funds belong to [the defendant's] customers under a constructive trust, not to [the defendant] himself. Since the funds do not belong to [the

> defendant], the IRS lien does not attach to the receivership funds.

Id. at 704.

Similarly, in *Reliance Insurance Co. v. Brown*, 40 B.R. 214 (W.D. Mo. 1984), the plaintiff, Reliance Insurance Company, filed an adversary proceeding in the bankruptcy court seeking a constructive trust over certain funds obtained by the debtor through a fraudulent insurance scheme. The bankruptcy court held that the facts warranted the imposition of a constructive trust. On appeal to the district court, the trustee argued that the constructive trust could not defeat federal tax liens which arose prior to the bankruptcy court's order. *See id.* at 218. The Court observed that

> [t]he basic rule regarding the creation of constructive trusts, however, is that "the decree establishing the constructive trust amounts to a holding that the defendant ought to be treated as if he had been a trustee for the plaintiff from the time the defendant began to hold the property unconscionably. The constructive trust does not exist merely because of the wrongful holding, but requires a court decree for its origin and this decree is retroactive in effect to the date when the unlawful holding began." Accordingly, the constructive trust arose prior to the time the tax liens are claimed to have arisen, and, therefore, the imposition of the constructive trust relates back and defeats the tax lien.

Id. (citation omitted) (quoting Bogert, *The Law of Trusts* 288 (5th ed. 1973)).[8] Similarly, in *TMG II v. United States*, 778 F. Supp. 37 (D.D.C. 1991) (mem. op.), the court found that federal tax liens would not attach to property subject to a constructive trust, but ultimately held that the plaintiffs had failed to demonstrate a basis for a constructive trust. *See id.* at 46-50. Notably, in that case, the IRS conceded that "tax liens do not attach to properties subject to a constructive trust because, while the taxpayer may have legal title, the constructive trust gives its 'beneficiary' equitable title." *Id.* at 46.

The Court agrees with the courts in *Crittenden*, *Reliance*, and *TMG II* and finds that the reasoning in those cases is also applicable to constructive trusts arising under Michigan law. As noted above, a trustee of a constructive trust holds bare legal title to the property that is subject to the trust for the benefit of the beneficiary. *See Kammer Asphalt*, 443 Mich. at 188, 504 N.W.2d at 641-42. The parties in this case, by their actions, demonstrated that they understood that Plaintiffs were the true owners of the property and that Defendants had no right to possess, use, or convey it. For more than thirteen years, Alexander, both individually and through LTDC and HCDC, acknowledged that Plaintiffs were the true owners of the property and that good title had been

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[8] The result in *Reliance*, imposition of a constructive trust by a bankruptcy court over assets in the estate, is inconsistent with the Sixth Circuit's holding in *In re Omegas Group*. However, the *Reliance* court's conclusions with respect to the relationship between federal tax liens and constructive trusts under state law are still relevant in this case, as *In re Omegas* does not preclude this Court from imposing a constructive trust.

conveyed to Plaintiffs through the warranty deeds. Similarly, Rosemary did not claim an interest in the property until after Judge Shapero ordered her to amend her bankruptcy schedules to list the property as an asset. Under these facts, the Court concludes that the Butchers did not have an interest in the property to which the IRS's lien could attach. Therefore, the Court concludes that the IRS's Notices of Federal Tax Liens are subordinate to Plaintiffs' interests in the property.

Conclusion

For the foregoing reasons, the Court will grant Plaintiff's motion for summary judgment and deny Defendants' motion for summary judgment.

Dated: DECEMBER 14, 1998

/s/_____
GORDON J. QUIST
UNITED STATES DISTRICT JUDGE

APPENDIX H

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

No. 1:91-CV-979

[Filed December 14, 1998]

JOBST W.F. BLACHY, et al.,	)
Plaintiffs,	)
	)
v.	)
	)
ROBERT BUTCHER, et al.,	)
Defendants.	)
	)

HON. GORDON J. QUIST

ORDER

In accordance with the Opinion filed on this date.

IT IS HEREBY ORDERED that Plaintiffs' Motion for Summary Judgment (docket no. 40) is **GRANTED** and that Defendant's-Motion for Summary Judgment (docket no. 33) is **DENIED**.

IT IS FURTHER ORDERED AND ADJUDGED that Alexander M. Butcher and Rosemary C. Butcher held title to the real property as constructive trustees for the benefit of Little Traverse Development Co., Harbor Cove Development Co., and those persons or entities to whom title was conveyed by said corporations as listed on Appendix A and Appendix B (attached hereto) and their heirs, successors, and assigns, which real property is described as:

> Part of the South ½ of Section 16, T35N, R5W, Little Traverse, County of Emmet, and State of Michigan, described as: Commencing-at the West 1/4 corner of Section 16, T35N, R5W, Emmet County, Michigan; thence S89°32'30"E 2376.18 feet; thence S9°46'50"W 350.00 feet to the PLACE OF BEGINNING; thence S52°12'20"E 1025.94 feet; thence S4°0'E 263.00 feet; thence S54°0'w 93.00 feet; then S44°24'W 439.21 feet; thence along the centerline of Beach Drive on the following courses: N73°41'50"W 36B.52 feet and N73°15'W 290.00 feet; thence N9°46'50"E 1088.34 feet to the Place of Beginning, containing 17.S3 acres, more or less,

which includes Units 90 through 104 of Harbor Cove Phase II, Emmet County Condominium Subdivision Plan No. 19, as recorded in the Master County records, and amendments thereto, and Units 105 through 113 of Harbor Cove Phase III, Emmet County Condominium Subdivision Plan No. 49, as recorded in the Master Deed of Harbor Cove Phase III in Liber 344, Pages 901-939, Emmet County Records, pursuant

to a deed dated July 12, 1978, recorded on July 14, 197S, in Liber 286, Pages 527, Emmet County Records (the "Property").

IT IS FURTHER ORDERED AND ADJUDGED that all Notices of FederalTax Liens of the Internal Revenue Service filed against Alexander M. Butcher and Rosemary C. Butcher, including those dated September 22, 1987, September 9, 1988, December 23, 1989, April 19, 1989, and March 6, 1990, are subordinate to the interests of the persons or entities listed in Appendix A and Appendix B as owners, or their heirs, successors or assigns, and, therefore, do not attach to Units 90 through 104 of Harbor Cove Phase II and Units 105 through 113 of Harbor Cove Phase III or the property.

IT IS FURTHER ORDERED that a certified copy of this Order is to be filed in the Emmet County real property records to evidence the state of title in the Property as legally defined as being both legally and equitably vested in the persons on Appendices A and B, their heirs, successors, and assigns as of July 12, 1978.

Dated: DECEMBER 14, 1998

/s/_____
GORDON J. QUIST
UNITED STATES DISTRICT JUDGE

(APPENDIX A)

LIST OF THOSE WHO PURCHASED CONDOMINIUM UNITS IN HARBOR COVE PHASE II

(a) Jack M. Gale and Davida Gale, Unit 90, by Warranty Deed dated October 22, 1981 and recorded November 24, 1982.

(b) Dr. Peter E. Boss and Jeanette A. Boss, Unit 91, by Warranty Deed dated March 9, 1984.

(c) A.G.A. Studio, Inc., Unit 92, by Warranty Deed dated December 18, 1981 and recorded January 13, 1984.

(d) Kenneth W. Gitlin and Roslyne Gitlin, Unit 93, by Warranty Deed dated March 24, 1982 and recorded November 16, 1982.

(e) Roger L. Gonda and Yvonne E. Gonda, Unit 94, by Warranty Deed dated March 9, 1984 and recorded March 13, 1984.

(f) Anthony J. D'errico and Ann T. D'errico, Unit 95, by Warranty Deed dated November 21, 1981 and recorded November 29, 1982.

(g) T F C Agency, Inc., Unit 96, by Warranty Deed dated January 28, 1984 .and recorded February 7, 1984.

(h) Curtis C. Haan and Margaret J. Haan, and Eleanor Haan, Unit 97, by Warranty Deed dated March 7, 1983 and recorded April 5, 1983.

(i) Irving Shanbom and Patricia Shanbom, Unit 98, by Warranty Deed dated December 6, 1982 and recorded January 5, 1983.

(j) Gunther S. Meisse and Jeanne R. Meisse, Unit 99, by Warranty Deed dated June 27, 1983 and recorded June 30, 1983.

(k) Dr. Richard J. Dobies and Florence H. Dobies, Unit 100, by Warranty Deed dated February 16, 1984 and recorded May 7, 1984.

(1) Donald P,. Tope, Sr., Unit 101, by Warranty Deed elated August 7, 1982 and recorded August 13, 1982.

(m) George F. Malley and Barbara C. Malley, Unit 102, by Warranty Deed dated April 21, 1983 and recorded April 29, 1983.

(n) Jobst W. F. Blachy and Lyrme A. Blachy, .Unit 103, by Warranty Deed dated December 5, 1984 and recorded December 12, 1984.

(o) Steven J. Fishman and Windsor W. Fishman, Unit 104, by Warranty Deed dated May 20, 1983 and recorded May 31, 1983.

(APPENDIX B)

THOSE WHO PURCHASED CONDOMINIUMS IN HARBOR COVE PHASE III

(a) Northwestern Savings and Loan Association, Units 105, 106, 107, 109, 110, 112, and 113, by Warranty Deed dated January 28, 1987 and recorded February 13, 1987.

(b) Ronald W. Mitchell and Patricia W. Mitchell, Unit 108, by Warranty Deed dated December 5, 1985 and recorded December 5, 1985.

(c) Harry Warholak and Dorothy O. Warholak, Unit 109, by Warranty Deed dated December 20, 1985 and recorded April 7, 1986.

(d) Thomas G. Allshouse and Sheryle K. Allshouse, Unit 111, by Warranty Deed dated August 12, 1985 and recorded August 13, 1995.

APPENDIX I

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

99-1185/1492/1523

[Filed October 18, 2000]

JOBST W.F. BLACHY, et al.,	)
Plaintiffs-Appellees,	)
	)
v.	)
	)
ROBERT BUTCHER AND ROSEMARY BUTCHER, ET AL.,	)
Defendants-Appellants (99-1185/1492),	)
	)
UNITED STATES OF AMERICA, ON BEHALF OF THE INTERNAL REVENUE SERVICE,	)
Defendant-Appellant (99-1523).	)

ORDER

BEFORE: WELLFORD, SILER, and GILMAN, Circuit Judges.

The court having received two petitions for rehearing en banc, and the petitions having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petitions for rehearing have been referred to the original panel.

The panel has further reviewed the petitions for rehearing and concludes that the issues raised in the petitions were fully considered upon the original submission and decision of the cases. Accordingly, the petitions are denied.

ENTERED BY ORDER OF THE COURT

/s/_____
Leonard Green, Clerk

APPENDIX J

UNITED STATES OF AMERICA
IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN,
SOUTHERN DIVISION

No. 91-1648 CH

[Filed November 18, 1991]

JOBST W.F. BLACHY and LYNNE A. BLACHY, DAVIDA GALE, TRUSTEE, PETER E. BOSS AND JEANETTE A. BOSS, KENNETH W. GITLIN and ROSLYNE GITLIN, JOSEPH H. JONES and BARBARA ANN JONES, T F C AGENCY, INC., a Michigan corp., GEORGE F. MALLEY and BARBARA C. MALLEY, RICHARD A. MONASH and CAROL MONASH, E. JEROME McCARTHY, GUNTHER S. MEISSE and JEANNE R. MEISSE, IRVING SHANBOMB and PATRICIA SHANBOMB, RONALD W. MITCHELL and PATRICIA W. MITCHELL, ANTHONY J. D'ERRICO and ANN T. D'ERRICO, NORTHWESTERN SAVINGS AND LOAN ASSOCIATION, LAWYERS TITLE INSURANCE CORPORATION,

a Virginia corporation, jointly and severally,)
Plaintiffs,)
)
vs.)
)
ALEXANDER M. BUTCHER; LITTLE)
TRAVERSE DEVELOPMENT CO.,)
a Michigan corporation; H.C.)
DEVELOPMENT CO., a Michigan)
corporation; INTERNAL REVENUE)
SERVICE,)
Defendants.)
)

Hon. Richard M. Pajtas

NOTICE OF REMOVAL

NOW COMES defendant Internal Revenue Service, by and through its attorneys, John A. Smietanka, United States Attorney, and Daniel M. LaVille, Assistant United States Attorney, and files this Notice of Removal of the instant case from Emmet County Circuit Court, State of Michigan, for the following reasons:

1. The instant case was originally filed in the Circuit Court for the County of Emmet, State of Michigan, on or about October 16, 1991. It is designated Circuit Court Case No. 91-1648 CH. (Complaint attached hereto as Exhibit A.)

2. A copy of plaintiff's Complaint was received by the United States Attorney's Office on October 21, 1991.

3. This action is removable pursuant to 28 U.S.C. § 1441 and § 1444 as it is a quiet title action commenced in a State court against a governmental agency in which the United States has original jurisdiction pursuant to 28 U.S.C. 2410.

4. This notice is filed within thirty days after this defendant received a copy of the Complaint.

5. By filing this Notice of Removal the defendant Internal Revenue Service does not waive any legal defenses in this matter but expressly reserves its right to raise any and all legal defenses in subsequent pleadings in this Court.

WHEREFORE, the defendant represents that the removal statutes have been complied, with and thus, this case stands removed from the Emmet County Circuit Court to the United States District Court for the Western District of Michigan, Southern Division.

JOHN A. SMIETANKA
United States Attorney

/s/_____
DANIEL M. LAVILLE
Assistant United States Attorney
399 Ford Federal Building
Grand Rapids, Michigan 49503
(616) 456-2404

Dated: November 18, 1991

APPENDIX K

UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

[February 11, 1994]

IN RE:

ROSEMARY C. BUTCHER Debtor.	CASE NO. 91-02274-S Chapter 7 HONORABLE WALTER SHAPERO

JOBST W.F. BLACHY, et al., jointly and severally, *Plaintiffs*, v. ROSEMARY C. BUTCHER, et al., *Defendants*.	) Adversary Proceedings) No. 92-0173 and) No. 93-4819) Consolidated

ORDER SUBSTITUTING INTEREST OF ALEXANDER BUTCHER

At a session of said court held in the United States Courthouse, Detroit, Michigan on February 11, 1994

PRESENT: HON. WALTER SHAPERO
U.S. Bankruptcy Judge

Came on for consideration for this day the Motion by Lawyers Title Insurance Corporation for Substitution of the interest of Alexander M. Butcher. The court having reviewed the motion and the responses in opposition thereto, and upon due notice and hearing, and the court being otherwise fully advised in the premises, finds good cause to grant the relief as requested.

IT IS THEREFORE ORDERED that the Co-Personal Representatives of the probate estate of Alexander M. Butcher, being Rosemary C. Butcher and Robert E. Butcher, be substituted as a party to represent the interests of Alexander M. Butcher in the Consolidated Adversary Proceeding 92-0173 and 93-4819 for all purposes. The time periods specified in this Court's Amended Scheduling Order, dated July 9, 1993, Items 2 through 4, are now operative.

IT IS SO ORDERED.

/s/_____
WALTER SHAPERO
UNITED STATES BANKRUPTCY JUDGE

APPENDIX L

Fold out

☒ Preliminary
☐ Revised Preliminary
☐ Final

OPINION OF TITLE

FOR

Emmet COUNTY

FILE NO. 4478

TITLE INSURANCE POLICY

The undersigned addresses the following opinion of title to Lawyers Title Insurance Corporation as its approved attorney with the understanding that the opinion is based upon examination of the evidence of title described on the reverse side hereof as well as upon such personal knowledge of the subject land and the parties as the examiner may have. It is also understood that this opinion is made subject to the rights of parties in possession, matters discloseable only by survey and mechanics' liens not of record.

AMOUNT AND TYPE OF POLICY

$ _____ OWNER'S POLICY	$ 1,580,000 00 A.L.T.A. MORTGAGE POLICY WITHOUT EXCEPTIONS	$ _____ A.L.T.A. MORTGAGE POLICY WITH EXCEPTIONS

PARTY TO BE INSURED

City National Bank

DESCRIPTION OF LAND

(If located within a recorded plat or subdivision furnish Liber and Page of Plat recording)

Situated in Twp of Little Traverse, Emmet County, Michigan

use Parcel #1 on 286/624

DEPOSITION EXHIBIT P-45 BAUKEY 9-11-92

OWNER, ENCUMBRANCES, EXCEPTIONS TO TITLE, UNPAID TAXES AND REQUIREMENTS FOR ISSUANCE OF THE POLICY

1. OWNER: Little Traverse Development Company

REQUIREMENT: ☐ NONE; ABOVE OWNER'S TITLE TO BE INSURED.
☐ RECORD PROPER CONVEYANCE FROM ABOVE OWNER AND WIFE, IF ANY, TO _____

2. REQUIREMENT: RECORD MORTGAGE FOR THE SUM OF $ 1,580,000 — TO BE EXECUTED BY L.T.D. Co TO City Nat'l —

___ REQUIREMENT: SUBMIT RESOLUTION OF BOARD OF DIRECTORS AUTHORIZING EXECUTION OF PROPOSED MORTGAGE.

By additional numbered exceptions, show all interests, liens, easements, restrictions, or other encumbrances or defects disclosed by the examination or known to the examiner which merit remedial action or exception in the proposed policy. Refer to instruments by their type, date and recording data. Easements, rights of reverter or annual maintenance charges disclosed by restriction deeds should be shown by separate additional numbered exceptions. Specify type, location and route of easements. Show state in which corporations are incorporated. List names of all partners as well as name of partnership and signify whether co-partnership is registered. Use such of the following stock exceptions as you find appropriate.

3. MORTGAGE for the sum of $ 125,000 given by above

to Nat'l Bank

dated 7-13-78 and recorded 7-18-78 in Liber 286 of Miges. on page 622 and assigned to Otis Cowles & Co. Land —

by assignment dated _____ and recorded _____ in Liber _____ of Miges. on page _____

REQUIREMENT: ☐ NONE; ABOVE MORTGAGE TO BE ☐ ASSUMED. ☐ INSURED.
☐ RECORD PROPER RELEASE OF ABOVE MORTGAGE.

___ EASEMENT in favor of _____ for _____
recorded in Liber _____ of Deeds on Page _____
over the following described route: _____

REQUIREMENT: NONE; ABOVE TO BE SHOWN IN FINAL POLICY.

EXHIBIT 12

BEST AVAILABLE COPY

____ EASEMENT for public utilities over the_____feet of the land as discloses

REQUIREMENT: NONE; ABOVE TO BE SHOWN IN FINAL POLICY.

____ BUILDING AND USE RESTRICTIONS, as contained in instrument dated_____ and recorded_____
In Liber_____of Deeds on Page_____which (are) (are not) accompanied by a right of revert

REQUIREMENT: NONE; ABOVE TO BE SHOWN IN FINAL POLICY.

____ LAND ABUTS ON ☐ Public Road ☐ Private Road ☐ Neither

____ DOES LAND ABUT ON WATER ☐ Yes ☐ No

(Continue, listing other mortgages, easements, life estates, leases, mineral reservations, defects, etc. showing any requirements for removal of exceptions.)

4. Easement granted unto Michigan Public Service Company, dated 12-12-53 & rec'd L 91 P260, Em. Co. Rec —

5. RD. lane —

6. Well #6 on EM 2723

1. TAXES: County [illegible]
City or Village
Current Taxes ☐ Due ☐ Paid ☐ Not Examined
Special Assessments

REQUIREMENT: PAYMENT OF ABOVE ITEMS, IF NOT PAID, THEY WILL BE SHOWN IN FINAL POLICY.

LOCAL UNIT LIEN DATE

EFFECTIVE DATE OF OPINION

4-29-81 8A

The foregoing opinion is based upon examination of:
☐ Abstract of title certified from_____to_____
by_____
☐ Existing_____Policy No._____
☐ Existing L. T. I. C. Policy No._____
and partial abstract extended from said policy date to_____
by_____

EXAMINING ATTORNEY

EXHIBIT 12

APPENDIX M

Fold out

LIBER 286 PAGE 624

State of Michigan } Recorded 18th Day of
County of Emmet } July A.D. 1978 At 12:25
O'clock P M
Julia E. Beer
REGISTER OF DEEDS

MORTGAGE

THIS MORTGAGE, Made the 13th day of July, 19 78.

by Alexander M. Butcher and Rosemary C. Butcher, his wife, and Little Traverse Development Co., a Michigan corporation, of 373 East Main Street, Harbor Springs, Michigan ~~XXXXXX~~, hereinafter called the "Mortgagors" (which word wherever used herein, shall be deemed to mean "Mortgagor" if this mortgage is executed by only one person), unto FIRST NATIONAL BANK AND TRUST COMPANY, Petoskey, Michigan, hereinafter called the "Mortgagee."

WITNESSETH, That the Mortgagors, in consideration of - - - - - - - - - - - - - - - - -

One Hundred Twenty-five Thousand and no/100 - - - - - - - - - - - Dollars ($ 125,000.00) from the Mortgagee, the receipt whereof is hereby acknowledged, and in order to secure the repayment of said sum, with interest as hereinafter provided, and the performance of the covenants hereinafter contained, hereby MORTGAGE and WARRANT unto the Mortgagee, its successors and assigns, the following described real estate situated in the Township of Little Traverse,

Emmet County, Michigan, described as follows, to-wit:

PARCEL 1: Part of the South 1/2 of Section 16, Town 35 North, Range 5 West described as: Com. at the West 1/4 corner of Section 16, S 89°32'30" East 2376.18 ft.; S 9°46'50" West 350 ft. to POB; S 52°12'20" East 1025.94 ft.; S 4°0' East 263 ft.; S 54°0' West 93 ft.; S 44°24' West 439.21 ft.; thence along the centerline of Beach Drive on the following courses: N 73°41'50" West 368.52 ft., and N 73°15' West 290 ft.; N 9°46'50" East 1088.34 ft. to POB. PARCEL 2: Apartments No. 2, 5, 8, 11 and 39, Harbor Cove Condominium, Emmet County Condominium Subdivision Plan No. 14 as described in Master Deed recorded in Liber 266, Pages 858-895 Emmet County Records. PARCEL 3: Com. at the South 1/4 corner of Section 15, Town 35 North, Range 5West; thence along the North and South 1/4 line of said Section 15, North 418 ft.; thence parallel with the South line of said Section 15, S 89°38'24" East 33 ft. to POB; thence along the East line of Highway M-131 North 172 ft.; S 89°38'24" East 124 ft.; South 172 ft.; N 89°38'24" West 124 ft. to POB. An easement for ingress and egress over a parcel of land described as follows: Com. at the South 1/4 corner of Section 15, Town 35 North, Range 5 West, Emmet County Michigan; thence along the North and South 1/4 line of said Section 15 North 418 ft.; thence parallel with the South line of said Section 15, S 89°38'24" East 157 ft. to POB; North 70 ft.; S 89°38'24" East 50 ft.; South 70 ft.; N 89°38'24" West 50 ft. to POB. ALSO an easement for ingress and egress over a parcel of land described as follows: Com. at the South 1/4 corner of Section 15, Town 35 North, Range 5 West, Emmet County, Michigan; thence along the North and South 1/4 line of said Section 15, North 418 ft.; thence parallel with the South line of said Section 15, S 89°38'24" East 33 ft.; thence along the East line of Highway M-131 North 172 ft. to POB; thence continuing along the East line of Highway M-131 North 38 ft.; S 89°48'38" East /124 ft.; South 33.37 ft.; N 89°38'24" West 124 ft. to POB.

TOGETHER with all the tenements, easements, hereditaments, and appurtenances thereof, including, but not by way of limitation, all buildings and improvements thereon, all lighting, heating, and plumbing fixtures, appliances and equipment, window shades, screens, storm doors and sash, built-in furniture, motors, boilers, furnaces, air conditioners, and all apparatus and fixtures of every kind, whether used for the purpose of supplying or distributing heat, refrigeration, light, water, air, power, or otherwise, now in or which hereafter may be placed in any building or improvement upon said property; and all the foregoing are declared to be part of said real estate whether physically attached thereto or not; together with the rents, issues, and profits of every name, nature, and kind as provided in paragraph 10 hereof.

This mortgage is given to secure:

1. The payment of a certain indebtedness payable to the order of the Mortgagee evidenced by the Mortgagors' note of even date in the principal sum of One Hundred Twenty-five Thousand and no/100 - - - - - - - - - - - - - - - - - - Dollars ($ 125,000.00) payable according to the terms of a mortgage note bearing even date herewith executed by Mortgagors to the said Mortgagee, together with;

2. Any additional advances made by Mortgagee to Mortgagors or their successors in title for which this mortgage shall be a continuing security, which said additional advances shall be evidenced by supplemental mortgage notes to be executed by the Mortgagors at the time such additional advance or advances are made; provided, that this mortgage shall not at any time secure the combined balances of all outstanding notes for more than One Hundred Twenty-five Thousand and no/100 - - - - - - - - Dollars ($ 125,000.00), plus interest charges, costs, and any advances that may be made for the protection of the security, as herein provided; and it is expressly understood and agreed that any life or disability insurance premiums advanced by the Mortgagee on policies assigned to it as additional security hereunder, shall be considered as advances made for the protection of the security. It is the intention hereof to secure the payment of the total indebtedness of the Mortgagors, or their successors in title, to the Mortgagee within the limits prescribed herein, whether the entire amount shall have been advanced to the Mortgagors at the date hereof or at a later date, or having been advanced shall be paid in part and further advances thereafter made. All such future advances so made shall be liens and shall be secured by this mortgage to the same extent as the amount originally advanced on the security of this mortgage and all such future advances shall be liens on the property herein described as of the date hereof.

SEE PAGE TWO FOR CERTIFICATION OF RECORD

EXHIBIT 23

23

BEST AVAILABLE COPY

A. The Mortgagors, for themselves, their representatives, assigns, and successors in title, do hereby covenant and agree to and with the Mortgagee, its successors and assigns, as follows:

(1) That the word "indebtedness" as herein used shall include all sums owed or agreed to be paid to the Mortgagee, its successors and assigns by the Mortgagors or their successors in title, either under the terms of the Mortgagors' note as originally executed, or as modified and amended by any supplemental note or under the terms of this Mortgage, any supplement thereto, or otherwise.

(2) That the Mortgagors will pay to the Mortgagee, its successors and assigns, the indebtedness secured hereby. All such payments to be made at the office of the Mortgagee in the City of Petoskey, Michigan, and to be credited at all times in the manner provided in said mortgage note or supplemental notes.

(3) That until the indebtedness secured hereby is fully paid, the Mortgagors will keep the buildings on said premises insured in mode, manner, and amounts approved by the Mortgagee, and deliver all policies of such insurance and renewals thereof to the Mortgagee; will pay all taxes, assessments, and other charges which may be imposed by law upon the mortgaged premises when the same shall become due and payable.

(4) Upon default of the Mortgagors to procure and maintain such insurance, or to promptly pay such taxes, assessments, or charges when due, or to make such necessary repairs, the Mortgagee may procure and maintain such insurance, pay such taxes, assessments, or changes, and make such necessary repairs, and all sums paid therefor shall be a lien on the mortgaged premises, added to the indebtedness secured hereby and payable forthwith with interest at the same rate as is provided in the mortgage note of even date herewith.

(5) In case any building on said premises shall be damaged or destroyed by fire, the Mortgagee may demand and receive the proceeds of insurance against such loss and at its option apply the same in payment of the indebtedness secured hereby, or apply the same toward the repair or replacement of such building without affecting the lien of this mortgage or the obligation of the Mortgagors for the full amount secured hereby before such loss or damage occurred.

(6) To commit or suffer no waste of such property, and to maintain the same in good condition and repair; to pay promptly all bills for such repairs and all other expenses incident to the ownership of said property in order that no lien of mechanics or materialmen shall attach to said property; and to suffer or permit no unlawful use of nor any nuisance to exist upon said property; not to weaken, diminish, or impair the value of said property or the security intended to be effected by virtue of this mortgage by any act or omission to act; to appear in and defend any proceeding which in the opinion of the Mortgagee affects its security hereunder, and to pay all costs, expenses and attorney's fees incurred or paid by the Mortgagee in any proceeding in which it may be made a party defendant by reason of this mortgage.

(7) To provide for payments of taxes, assessments, and insurance premiums, stipulated to be paid hereunder, the Mortgagor shall deposit with the Mortgagee on each monthly payment date an amount equal to one-twelfth of the annual taxes and assessments levied against said premises, and one-twelfth of the annual premium on all such insurance, as determined by the amount of the last available bills. All such deposits as made are pledged as additional security for the payment of the principal mortgage indebtedness. If default is made in the payment of said deposits, the Mortgagee may charge the same to the unpaid balance of the mortgage indebtedness and the same shall bear interest at the same rate as the principal mortgage indebtedness. As taxes and assessments become due and payable and as insurance policies expire, or premiums thereon become due, the Mortgagee is authorized to use such deposits for the purpose of paying taxes or assessments, or renewing insurance policies or paying premiums thereon, and in the event any deficit shall exist in the amount of such deposits the Mortgagor agrees to pay any difference forthwith.

(8) That no sale or conveyance of said property will be made without prior written consent of Mortgagee. Mortgagee will require compliance with the following requirements before its consent will be given:

(a) Payment to Mortgagee of an assumption or transfer fee in an amount as determined by the Mortgagee at the time its consent is requested.
(b) The proposed grantee must sign an assumption agreement with the Bank on the Bank's form, in which he assumes and agrees to pay the note and mortgage and he must furnish the credit information as requested.
(c) Mortgagee may increase the interest rate in the note, modify the amount of the monthly payment, and make other changes in the terms and conditions of the note and mortgage.

For failure to comply with this paragraph, the Mortgagee, at its option, may declare the entire indebtedness secured hereby immediately due and payable in accordance with paragraph 9 hereof.

(9) Upon default of the Mortgagors in the payment of any of the sums of money above mentioned, and if such default is not made good prior to the due date of the next installment accruing under the terms of the mortgage note, or upon default in the performance of any other covenant of this mortgage, the entire indebtedness secured hereby, shall at the option of the Mortgagee, and without notice or demand, immediately become due and payable and the same may be collected, and this mortgage may be foreclosed and said premises sold in any manner provided by law. And the Mortgagors do hereby expressly authorize and empower the Mortgagee, its successors and assigns, to grant, bargain, sell, release and convey the said premises, with the appurtenances, at public auction, and on such sale to make, execute, and deliver to the purchaser or purchasers good and sufficient deed or deeds of conveyance, pursuant to the statute in such case made and provided, and out of the moneys received on such sale, to retain all sums then due hereunder, the costs and expenses of such sale, and the attorney fee provided by statute, rendering the surplus moneys, if any there should be, to the Mortgagors, their representatives or assigns.

(10) Upon default in the payment of any of the sums of money above mentioned, the Mortgagee may, at its option, demand and receive from the occupiers of said premises, all the rents, issues, and profits thereof, which then are or may thereafter be due and owing to the Mortgagors, their representatives or assigns, and apply the same to the payment of the indebtedness hereby secured, and in such case the Mortgagors, their representatives or assigns, shall be deemed to have assigned such rents, issues, and profits to the Mortgagee as additional security for the payment of the indebtedness hereby secured.

(11) This mortgage shall be discharged upon payment to the Mortgagee of the indebtedness secured hereby, pursuant to the terms hereof.

B. The Mortgagors further covenant:

(1) That in case of their failure or inability to perform any of the covenants herein, the Mortgagee may do any act or pay any sum that it may deem necessary to maintain or repair said property or to protect the lien of this mortgage. All sums paid or disbursed by the Mortgagee for any such purpose and all expenses and charges in connection therewith shall become an additional indebtedness secured by this mortgage. All sums advanced by the Mortgagee under the terms of any of the covenants herein shall be, at the option of the Mortgagee, either added to the unpaid balance of the mortgage indebtedness secured hereby or declared immediately due and payable, but in either event, shall bear interest from the date of disbursement at the same rate as provided in the note of even date herewith. It shall not be obligatory on the Mortgagee to

I hereby certify that this is a true and correct copy as Mtg recorded in Liber 286 Pages 624 as appears by the records in the office of the Register of Deeds for Emmet County, Michigan.

9-9-92 Elaine A. Lajoie
Date Register of Deeds

EXHIBIT 22

inquire into the validity of any lien, encumbrance or claim in advancing moneys on that behalf as herein authorized, but nothing herein contained shall be construed as requiring the Mortgagee to advance any moneys for any purpose, nor do any act hereunder, nor shall the Mortgage incur any liability because of anything that it may do or omit to do hereunder.

(2) That in the event the ownership of said property or any part thereof becomes vested in a person or persons other than the Mortgagors, the Mortgagee may, without notice to the Mortgagors, deal with such successors in interest with reference to this mortgage and the debt hereby secured and any deposits made hereunder in the same manner as with the Mortgagors.

(3) That if the time or terms of payment of the whole or any portion of the indebtedness secured hereby be extended or modified by the Mortgagee, the Mortgagors, sureties and guarantors thereof and any person or persons hereafter assuming the payment thereof, or any part thereof, shall be held hereby to waive notice of and consent to such extension and modifications and shall, notwithstanding such extension or modification, continue liable thereon to said Mortgagee, and shall pay the same at the time or times mentioned in any such extension or modification agreement, it being the intention hereof that the liability of the Mortgagors, sureties, and guarantors of said indebtedness shall under circumstances, whatsoever, continue in its original force until said indebtedness is paid in full.

IN WITNESS WHEREOF, the said Mortgagors have hereunto set their hands and seals the day and year first above written.

Witnesses:

John C. Linck

Elinor L. Williams

Alexander M. Butcher — Borrower

Rosemary C. Butcher — Borrower

LITTLE TRAVERSE DEVELOPMENT CO.

By: Alexander M. Butcher, President

STATE OF MICHIGAN, Emmet County ss:

On this 13th day of July 19 78, before me personally appeared Alexander M. Butcher and Rosemary C. Butcher of Petoskey, Michigan

to me known to be the same person(s) described in and who executed the within instrument, and acknowledged execution of the same as their free act and deed.

My Commission Expires:

John C. Linck — Notary Public

JOHN C. LINCK

Notary Public, Emmet County, Michigan

My Commission Expires May 21, 1979

JOHN C. LENCK
Notary Public, Emmet County, Michigan
My Commission Expires May 21, 1979

STATE OF MICHIGAN)
County of Emmet) ss.

On this 13thday of July, 1978, before me a Notary Public in and for said County, appeared Alexander M. Butcher, to me personally known, who being by me duly sworn, did say that he is President of Little Traverse Development Co., the corporation named in and which executed the within instrument; and that said instrument was signed and sealed in behalf of said corporation by authority of its board of directors; and said Alexander M. Butcher acknowledges said instrument to be the free act and deed of said corporation.

John C. Lenck

JOHN C. LENCK
Notary Public, Emmet County, Mich.
My Commission Expires May 21, 1979

This instrument prepared by the First National Bank and Trust Company, Petoskey, Michigan 49770 JCL:elw

(Space Below This Line Reserved For Lender and Recorder)

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EXHIBIT 23

Supreme Court, U.S.
FILED
FEB 15 2001
CLERK

(2)

No. 00-1155

IN THE
Supreme Court of the United States

ROSEMARY C. BUTCHER, et al.,
Petitioners,

v.

JOBST W.F. BLACHY, et al.,
Respondents.

On Petition For Writ of Certiorari
to The United States Court of Appeals
For The Sixth Circuit

RESPONSE OPPOSING PETITION FOR WRIT OF CERTIORARI

JAMES A. SMITH*
JEFFREY G. RAPHELSON
BODMAN, LONGLEY & DAHLING LLP
34TH FLOOR, 100 RENAISSANCE CENTER
DETROIT, MI 48243
(313) 259-7777
**Counsel of Record*

February 15, 2001

10 pp

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

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In re Gulf Oil/Cities Service Tender Offer Litigation, 142 F.R.D. 588, Fed. Sec. L. Reg. (CCH) ¶ 96,845 (S.O.N.Y. 1992) 1

The respondents (other than the United States) oppose the petition and ask that it be denied.

The arguments raised by Petitioner are almost entirely addressed by the Opinion of the Sixth Circuit Court of Appeals. Petitioner points out no important issue of federal law. The Court of Appeals concluded that Petitioner does not own the real property involved in this case, but holds it in constructive trust for the Respondents. That decision does not conflict with decisions of other Circuit Courts, nor with decisions of the Supreme Court[1]

Rosemary Butcher's petition reads as if this case were an exercise in property law, to determine where to award title among competing innocent claimants. In fact, Rosemary Butcher and her late husband exhibit none of "... the three somatic stigmata of good faith: the pure heart, the clean hand and the empty head." Mukasy, J., in *Re Gulf Oil/Cities Service Tender Offer Litigation*, 142 F.R.D. 588, 594, Fed. Sec. L. Rep. (CCH) ¶96,845 (S.D.N.Y. 1992). The petition glosses over the fact that the Butchers bamboozled innocent condominium purchasers. Petitioner offers no defense of those actions. Nevertheless, since 1991, she has sought to hang on to a claim to Respondents' properties.

FACTS

Alexander ("Mike") Butcher was the owner and president of LTDC, a development company. Rosemary, his wife, was LTDC's secretary. The Butchers deeded 36.65 acres of property to LTDC, recording the deed on July 12, 1978. On the same day, Alexander Butcher caused LTDC

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[1] Respondents have concurrently filed a conditional cross-petition concerning the Court of Appeals' conclusion that the lien of the IRS has priority over Respondents' ownership rights. One that issue, the decision is in conflict with other Circuits' decisions. Respondents were content to let the entire Court of Appeals decision stand. However, if this Court grants the Petition, Respondents request that it also grant the conditional cross-petition.

to re-deed 17.83 acres of the same property back to himself and Rosemary, but did not record it until July 14, 1978. LTDC later developed condominiums on the property deeded back, holding itself out as owner in state filings. LTDC sold the condominiums to Respondents and others. The Butchers did not cure the title problem, nor reveal it. Instead, they caused LTDC to convey the condominiums to innocent buyers, by warranty deeds, taking the buyers' money. The instances in which LTDC or the Butchers affirmed title in LTDC are set out in the Court of Appeals Opinion at Petitioner's Ap. 4a-5a and 11a-12a.[2] The Butchers asserted no title claim, allowing the condominium owners to move in and pay property taxes. Then, when Rosemary went bankrupt, she asserted a title interest in the parcel. No precept of law will shelter such behavior.

CASE HISTORY

Because Rosemary Butcher filed in bankruptcy and Alexander Butcher did not, unsorting the tangle they created has been laborious. The Court of Appeals observed that only a diabolical bar examiner would pose a tale so twisted. Petitioner's App. 2a. Rosemary Butcher seeks only to compound this one.

This case was filed in state court against Alexander Butcher, before he died. It was removed by the United States to the District Court for the Western District of Michigan. The District Court entered summary judgment for Respondents, concluding that the Butchers had no rightful interest in the condominiums. The constructive trust reached to Alexander's successor in interest, Rosemary Butcher, petitioner here. The relief was restricted to Alexander's interest because Rosemary

[2] The Opinion of the Sixth Circuit Court of Appeals is reported at 22 F.3d 896 (6th Cir. 2000.) The Opinion of the District Court is reported at 35 F. Supp.2d 554 (W.D. Mich. 1999).

Butcher, his wife, had filed for bankruptcy, while he had not.

ARGUMENT

Rosemary Butcher makes an elaborate argument about Michigan entireties titles, contending that the "title" of both Butchers somehow was insulated from courts of equity by her bankruptcy. Her apparent hope is to preserve some claim which no court can terminate. As the Court of Appeals held, Alexander's claimed interest in the property did not become part of Rosemary's bankruptcy estate.

The Court of Appeals dealt with this issue carefully and correctly. *See,* Opinion, at Petitioner's App. 17a-23a. When Rosemary Butcher filed in bankruptcy, Alexander was alive. He did not file for bankruptcy and no law prevented this suit against him. While this suit was pending, but after Rosemary filed her bankruptcy petition, Alexander quitclaimed his interest to her. Alexander's interest thus did not become part of Rosemary's bankruptcy estate. The action in the District Court was instituted against Alexander and continued against Rosemary as his successor in interest. Throughout, they were represented by Robert Butcher, as Rosemary is here.

The crux of Mrs. Butcher's entireties title argument is at page 12 of her petition. There, she argues that the Court of Appeals "should have imposed a constructive trust over Alexander's interest, which could be enforced only if Alexander survived Rosemary." She likens the constructive trust to a lien, citing *In re Arango,* 992 F.2d 611 (6th Cir. 1993). *Arango* did involve a judgment lien enforceable only against one spouse, and the effect of the other spouse's bankruptcy.

This argument is mistaken. Alexander and Rosemary Butcher both participated in the acts that gave rise to the constructive trust. *See,* Court of Appeals Opinion,

Petitioner's App. 22a, and District Court Opinion, Petitioner's App. 73a-74a. The constructive trust is not a lien, but a judicial declaration that the Butchers never had a right to assert title against the condominium owners. Any "title" in the Butchers' names was in trust for the rightful owners, from the day they were wronged. Because the Butchers' acts were wrongful, they had no valid interest in the properties. The condominium owners did not hold a "lien" on the Butchers' title. They owned the property — bought and paid for. The Butchers had no lawful interest on which to impose a "lien". They owned nothing.

The Butchers' fraudulent title was wrongfully withheld from the condominium owners from the day LTDC, the Butcher company, conveyed to them. *See,* Court of Appeals discussion, Petitioner's App. 25a-26a. Alexander's death did not end the court's power to right the wrong, to rule that a constructive trust existed, whether his "interest" remained in his hands or the hands of his successor. Rosemary Butcher was no innocent purchaser for value from Alexander, but a participant in his wrongdoing.

Under Michigan law, one who takes by quitclaim deed "acquires the right and title which his grantor had and no other." *Doelle v. Read,* 329 Mich. 655, 657, 46 N.W.2d 422, 423 (1951). This point was key to the Court of Appeals' ruling, which rejected Petitioner's elaborate theory that she preserved some kind of title to Respondent's condominiums. Opinion, Petitioner's App. 21a-22a.

Rosemary's petition argues deprivation of due process. She makes much of the District Court's order that she be served and ordered to show cause why the constructive trust should not be imposed, after the District Court had reached a decision. That order came in response to a last minute objection she raised after defending the case to conclusion.

Fed. R. Civ. P. 25(c) provides that, when an interest is transferred during suit, as it was here, the action may be continued against the original party, as the Court of

Appeals noted, Petitioner's App. 28a. Rosemary's argument about lack of service were raised late in the day, by motion for reconsidertion, and was a mere ploy. The District Court dealt with it appropriately, and within its broad power to add or substitute parties at any time. Fed. R. Civ. P. 17(a). Rosemary had her day in court.

Petitioner makes a final argument that the Court of Appeals made a fundamental error of fact, concerning issuance of a title commitment on July 18, 1978. Petition, at p. 29. Petitioner seems to argue that Lawyers Title Company could have figured out that the Butchers had taken a deed to the 17.83 acres and, therefore, the courts should let her keep it. That is nonsense.

The Court of Appeals addressed the same sort of argument and rejected it out of hand, applying established Michigan precedents. See, Opinion, Petitioner's App. p. 12a. ("The Butchers' misleading and deceptive conduct, however, will not be rewarded or justified simply because Lawyers Title failed to catch it." *Ibid.*)

To put this point to rest, we attach a list of recordings and commitments. App. 1a. This list was prepared by Petitioner and attached to her motion for summary judgment in the District Court. It became Joint Appendix page 240 in the Court of Appeals. It sets out the Butchers' recordation of the deed to LTDC on July 12, 1978, and the deed back to them the same day. That deed was not recorded until July 14, 1978. See, entries 2 and 7. Then came entry 8, in which Lawyers Title issued a sample commitment, used in the condominium filing package with Michigan regulators, issued in August, but as of July 13, 1978.[3]

July 13, 1978 was the day after the LTDC re-deed to the Butchers and the day before the re-deed was recorded. The reason the title commitment was made as of that day was because Alexander ("Mike") Butcher

[3] Petition accuses Respondents of lying about the existence of such a title commitment "dated July 18, 1978." This sample commitment was issued August 18, 1978. This one month error changes nothing.

requested it. Jt. App. 506, letter from Butcher to Arden Bawkey, of Lawyers Title. App. 2a. Butcher referred to the "state of the title up until July 13, 1978," not revealing that he had executed the LTDC re-deed to himself and his wife on July 12.

Petitioner offers no reason why Alexander Butcher redeeded the property to himself and to her, no explanation why they should have any right in the property, no excuse for their chicanery. The Court of Appeals was not misled. The connivance of the Butchers created the confusion which they later tried to use to their own benefit.

Because Rosemary Butcher filed in bankruptcy, the unsorting of this tangle has been difficult. But, it was not improper for the District Court to entertain a state law claim and impose a state law remedy to sort out Alexander's end of the title questions.

The decisions of the District Court and the Court of Appeals, declaring that the Butchers never had a right to the properties, were correct. The petition should be denied.

James A. Smith*
Jeffrey G. Raphelson
Bodman, Longley & Dahling LLP
34th Floor, 100 Renaissance Center
Detroit, MI 48243
(313) 259-7777
**Counsel of Record*

February 15, 2001

FROM THE DESK OF

ALEXANDER M. BUTCHER

8/17/78

EMXKK
68 copies = H

Arden:

Please furnish items 3 and 4 noted in the attached letter to Bill Myers of August 16th, as soon as possible. The date of the specimen form of title insurance commitment should be July 13, 1978, the date of the closing with First National Bank and Trust of Petoskey. The sample commitment should show the property in the name of Little Traverse Development Co. (i.e., the property included in the Harbor Cove Phase II condominium legal description only). Subject only to the City National Bank of Detroit construction loan since that was in fact the state of the title up until July 13, 1978.

You will also have to furnish copies of the documents which are of record and will be noted in your sample commitment such as the easements, etc., which may appear of record.

If you have any questions, please call me. I will need these documents by Monday afternoon at the end of the day August 21st and I will pick them up if you will call our office.

Thank your,

Mike Butcher

DEPOSITION EXHIBIT
P-69 Barker 9-11-92

506

EXHIBIT 126 166

1978 PROPERTY TRANSACTIONS

Recording Data	
1 7/12/78; 9:35 a.m.	**6/30/78** - Warranty Deed of **36.65 acres** to Butchers recorded. Consideration $640,000. State revenue taxes paid. (Complaint Exhibit 5) L286, P387 - 89, inclusive (Parcels 1, 2 & 6)
2. 7/12/78; 9:40 a..m.	**7/6/78** - Warranty Deed of **36.65 acres** from Butchers to LTDC recorded. Consideration $1.00 (Complaint Exhibit 6) L286, P390.
3.	**7/7/78** - Revised metes and bounds descriptions, dividing entire property into 6 parcels - Exhibit 15.
4. 7/12/78; 10:00 a.m.	**7/11/78** - $1,180,000 mortgage to City National Bank on **8.68 acres** out of the **36.65** acres recorded L286, P399. (Parcel 2).
5.	**7/11/78; 10:10 a.m.** - Lawyers Title issued commitment to insure $1,380,000 Mortgage from LTDC to City National Bank of Detroit recorded (Motion Exhibit 5) L286, P411. 9.69 acres out of the 36.65 acres. (Parcel 1)
6. 7/12/78; 10:05 a.m.	$1,380,000 mortgage dated **7/11/78** to City National Bank on **9.69** acres. L286, page 411. (Parcel 1)
7. 7/14/78; 9:45 a.m.	**7/12/78** - Warranty Deed from LTDC to Butchers of 17.83 acres (Complaint Exhibit 7), out of the **36.65 acres** recorded. L286, P527. (Parcel 6) $1.00 consideration.
8.	**August of 1978, <u>As of</u> 7/13/78; 8:00 a.m.** - Lawyers Title issued sample commitment (Exhibit 21) showing LTDC as owner of the 36.65 acres.
9. 7/18/78;; 11:40 a.m.	**7/13/78** - The Butchers borrowed $125,000 from National Bank and mortgaged the subject 17.83 acres - parcel 6. See Exhibit 18. L286, page 871.
10. 7/25/78; 11:40 a.m.	**7/24/78** - Butchers mortgage additional 58 acres to guarantee the $125,000 loan to City National Bank, L286, pp 871-3 (Exhibit 17).
11.	**8/18/78; 12:25 p.m., - <u>As of</u> 7/13/78** - Lawyers Title insured interests of First National Bank, and/or their assigns for loan to Butchers dated July 13, 1978. (Parcel 6) LTDC designed as owner - Parcel 1 on title policy. (Exhibit 19).
12. 11/14/78	**11/1/78** - Master Deed for Phase II recorded by LTDC (Complaint Exhibit 8) which included the entire **36.65 acres** L290, PP272-320, inclusive.

EXHIBIT 4

(3)

Supreme Court, U.S.
FILED
MAR 1 2001
CLERK

No. 00-1155

In the
Supreme Court of the United States

ROSEMARY C. BUTCHER, et al.,
Petitioners,

v.

JOBST W.F. BLACHY, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITIONERS' REPLY BRIEF

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Petitioners reply to Respondents (all other parties, except the United States) as follows:

Argument 1. Where no indemnification has been provided by a seller which lacks title to real estate, a constructive trust against identifiable purchase moneys in the seller's possession could be appropriate, but not against the real property; where indemnification has been provided the "purchaser," there is no longer any relationship between the parties which would sustain a constructive trust action to recover the purchase money. The insured Respondents never had any interest in the real property or any fiduciary relationship with the owners.

Where an agreement of sale is not consummated, due to lack of title in the "seller," the "buyer's" sole remedy is an action at law for damages for breach of contract. Petition, page 25. Where the transaction is completed, and the purchase money has been paid over to the "seller," the putative "buyer" is certainly entitled to attempt to recover **his money in** law or in equity, where no indemnification has been provided. See page 10 of Respondent's Conditional Cross-Petition for Writ of Certiorari.

But, where indemnification, in the form of insurance, has been provided, or, where the "seller" has paid the money over to lien holders, any fiduciary relationship between the "seller" and "buyer" is at an end. There is no longer a monetary constructive trust claim because the seller has performed his agreement by providing for reimbursement of the purchase money. In *Nash v. New York Life Ins. Co,* 272 Mich 680 (1935), syllabus 4 reads:

> "Upon the occurrence of a loss under an insurance policy the contractual status between insured and insurer changes from a contingent

> liability on the part of the insurer to an absolute liability."

An insurer cannot agree with an insured to shift its liability to someone else, after a loss occurs. *Daiie v. Ayvazian,* 62 Mich App 94, 100 (1975); *Madar v. League General Ins Co,* 152 Mich App 734, 742 (1986). What is happening is that Lawyers Title and its insureds have supposedly agreed that they will, by this action, try to shift Lawyers Title's admitted liability to Rosemary. Lawyers Title has breached the third party beneficiary agreements entered into with the development corporations, to indemnify the insureds against monetary loss. *See* MCL 600.1405.

On Petition page 25, Petitioners pointed out that "the insured Plaintiffs parted with money, and, they are entitled to recover money from the insurer." Petitioners made the same argument to the lower courts. In their Response and in their Conditional Cross-Petition for Writ of Certiorari, Respondents advance two conflicting claims of entitlement.

In their Response to the Petition for Writ of Certiorari, page 4, Respondents argue:

> "The constructive trust is not a lien, but a judicial declaration that the Butchers never had a right to assert title **against the condominium owners**. Any "title" in the Butchers' names was in trust for the rightful owners, **from the day they were wronged**. Because the Butchers' acts were wrongful, they had no valid interest in the properties. The condominium owners did not hold a "lien" on the Butchers' title. They owned the property - bought and paid for. The Butchers had no lawful interest on which to impose a "lien." They owned nothing.

> The Butchers' **fraudulent title** was wrongfully withheld from the condominium owners **from the day LTDC, the Butcher company, conveyed to them**. (Emphasis Supplied).

Under this argument, Respondents concede Alexander and Rosemary acquired and held good title to the **17.83** acres from and after July 12, 1978. After all, they paid for the property with their own money; they owned the property, free and clear, on July 12, 1978; the property had not been committed to a recorded Master Deed as of July 12, 1978; and, no Respondent has made any claim against either spouse before October 22, 1981, the date of the first "sale" by LTDC.

In their Conditional Cross-Petition, Respondents argue:

> Page 3: "The Court of Appeals properly affirmed the district court's finding that the Butcher defendants held the subject property in constructive trust for the cross-petitioning condominium owners. That finding was based upon the Butchers' misleading and deceptive conduct that took place beginning in 1978. Beginning in 1981, the Butchers' companies conveyed the condominiums to the cross-petitioners." Citing, at Page 41, *Stephenson v. Golden,* 279 Mich 710, 746, 276 NW 849 (1937), and *Nichols v. Martin,* 277 Mich 305, 269 NW 183 (1936).

Nowhere do Respondents claim or attempt to show any interest in the property before October 22, 1981, or, any fiduciary relationship between the insured Plaintiffs and Petitioners, at any time relating to the real property. The

purchase agreements and the deeds to the insureds were admittedly void.

Stephenson involved a claim against a real estate broker who, while engaged as Plaintiff's agent, bought real property in his name, rather than in the name of his principal. *Nichols* similarly involved a claim of wrongful acquisition by a party occupying a fiduciary status. These cases are inapplicable because neither Alexander nor Rosemary had any fiduciary obligation on July 12, 1978, to any respondent. They acquired the 17.83 acres for their own purposes. There is not even a claim that any insured even knew the couple in 1978.

A void contract cannot create any legal or equitable rights in the parties. In *Scott v. Bush,* 26 Mich 418, 420 (1873), the Court stated:

> "We have held in ... that a contract void under the statute of frauds, is a mere nullity, and cannot be used for any purpose whatever. And we cannot conceive of such a thing as a contract which cannot be enforced as a contract, and yet can be the foundation of legal obligations arising out of nothing else."

Plaintiffs have no cause of action except for restitution from LTDC and/or HCDC. For more than 100 years, the law in Michigan has been that:

> "The contract set out, being void under the Statute of Frauds, cannot be used as the foundation of any legal or equitable right. If the party pays money under such a void contract he may recover it back in assumpsit, ..."

Kelly v. Kelly, 54 Mich 30, 48 (1884). *See also Thorbahn v. Walker' Estate*, 269 Mich 586 (1934).

Respondents' claim, then, is that the "conveyances," after September of 1981, by the development corporations to "purchasers" were wrongful because neither corporation had valid title, which "wrongful" acts gave immediate rise to a constructive trust over property owned by Alexander and Rosemary, by the entireties, even though neither spouse was a party to the "sales" transactions. Respondents now concede there was no "wrongful" conduct in the acquisition of the property by Alexander and Rosemary in 1978. They insist that even though the corporations provided full indemnification to the "purchasers" from them, covering the void deeds, the insureds somehow acquired an ownership interest in the real property because they paid the agreed "purchase" moneys to non-owners.

The lower courts never paused to consider why, if lack of marketable title by a seller gives rise to a constructive trust against property owned by another, this is the first case in the 224 year history of the country to so hold. The short answer is that the parties to a sales transaction are not in a principal/fiduciary relationship and, in any event, the purchaser sustains no injury where the agreed-upon indemnification is provided.

Moreover, the proposition that a person who owns or controls a corporation and who causes that corporation to hire and pay a title insurer for 100 or more record title examinations, as required by state law, is somehow acting "wrongfully," is absurd on its face. The only relevant or meaningful title representations to the "purchasers" were contained in the title insurance commitments, as required by law, which were prepared by the title insurer, which thereby

obligated itself to insure the title under the specified conditions. If a title insurer can go against the true owner, despite its mistakes, it can never have any liability under its policies.

In their Conditional Cross-Petition, Respondents, pages 8, 9, cite *In re: Omegas Group,* 16 F 3d 1443 (6th Cir 1994), and, then at page 13, ask the Court to overrule it.

Omegas involved a claim of entitlement, under 11 USC § 541(d), to a constructive trust over money paid by Plaintiff to the bankruptcy debtor shortly before the filing, because debtor "wrongfully" (page 1451) appropriated Plaintiff's money. The panel rejected Plaintiff's claim saying, page 1451:

> "We think that § 541(d) simply does not permit a claimant in the position of Datacomp to persuade the bankruptcy court to impose the remedy of constructive trust for alleged fraud committed against it by the debtor in the course of their business dealings, and thus to take ahead of all creditors, and indeed, ahead of the trustee.

In this case, where the sellers provided indemnification, the court awarded relief against a non-party to the business transaction which is a double recovery for respondents.

Pursuing the § 541 (d) argument further, Respondents cite from the Legislative history of the Section, at page 10:

> "Situations occasionally arise where property ostensibly belonging to the debtor will actually not be property of the debtor, but will be held in trust for another. For example, if the debtor has incurred medical bills that were covered by

> insurance, and the insurance company had sent the payment of the bills to the debtor before the debtor had paid the bill for which the payment was reimbursement, *the payment would actually be held in a constructive trust for the person whom the bill was owed."*
>
> The US Congress clearly intended that § 541(d) of the Bankruptcy Code would not encompass property a debtor holds subject to a constructive trust. This court's holding to the contrary in *Omegas* directly conflicts with Congress's intent." (Emphasis added by Respondents).

Whether *Omegas* was correctly or incorrectly decided, the observation pertinent to this suit is simply that, as in *Omegas,* there was never any pre-existing fiduciary relationship between the insureds and Alexander, or Rosemary.

When the corporation "sellers" acquired the insureds' purchase moneys, without being able to convey marketable title to them, a constructive trust claim arguably could arise as to those funds received by the developers from the "purchasers," which are identifiable and still in the possession of the development corporations. Two applications of the § 541 (d) legislative history suggest themselves:

1. If the purchase money for a unit was paid to the seller, which failed to pay off a lien of record, making seller's title unmarketable, the purchaser could seek a constructive trust over the purchase money which should have been paid to the lien holder.

2. If Lawyers Title had paid the policies proceeds to the "seller," for the "seller" to indemnify the purchaser, it could seek a constructive trust over those moneys remitted by it which were not paid by the "seller" to the "purchaser."

Following the money, to make oneself whole, could make some sense where that is the only possibility for recovery, but it makes no sense when indemnification has been provided. Lawyers Title is not entitled to recover on a subrogation theory because it has not paid the claims of its insureds, and, because, under Michigan law, it can acquire no right of subrogation by paying its own obligations. Any such payment is an extinguishment of the liability. *Michigan Hospital Service v. Sharpe,* 339 Mich 357 (1954).

A constructive trust could be claimed over the purchase moneys "wrongfully" obtained by the development corporations, but not over the real property.

Argument 2. Every Plaintiff had constructive notice of Alexander and Rosemary's title to the property. *McBride v. McBride,* 250 Mich 601,603 (1930), *Houseman v. Gerken,* 231 Mich 253, 255 (1925), **whether or not they actually checked the record,** *Dwight v. Tyler,* 49 Mich 614, 616 (1883), at the time of any purchase after July 14, 1978. Recording of a deed in Michigan is constructive notice to all. If Debtor and her spouse had wanted to conceal the conveyance of July 12, 1978, from LTDC to themselves, they would not have recorded the Deed.

Argument 3. Lawyers Title had actual knowledge of Alexander and Rosemary's title to the property before it made any title commitment or policy errors.

Respondents, pages 5, 6, and 7 of Response, acknowledge that Lawyers Title was advised by letter dated

August 17, 1978, as to the "state of the title up until July 13, 1978." This letter alerted Lawyers Title to the fact that record title changed after July 13, 1978. After being alerted to changes in the record title, Lawyers Title issued a sample commitment and a mortgage policy in August of 1978, items 8 and 11 of Respondents' App 2a, which correctly show LTDC to be the owner of record on July 13, 1978.

Argument 4. Respondents are attempting to bamboozle this Court.

To Petitioner's charge, Petition page 29, that there was no **erroneous** commitment issued in July of 1978 (as the 6th Circuit erroneously held, App A at 4a, based on Respondents' false representations to it), Respondents concede that there was no erroneous commitment, and, that Lawyers Title in fact issued an **accurate** sample commitment in August of 1978, "as of July 13, 1978," Response pages 5, 6, and 7. So, everything is all right, according to the Respondents. But, the only basis given by the 6th Circuit for imposing the constructive trust, as of 1978, was Respondents' false claim of an erroneous commitment attributable to Alexander's conduct in July of 1978. There was no erroneous title commitment issued in July or August of 1978. Alexander did not mislead Lawyers Title. In his letter of August 17, 1998, he specifically advised the examiner that record changes occurred after July 13, 1978. Respondents should not be rewarded for making false representations to the Court. See Argument 3, Ante.

Argument 5. Contrary to Respondent's claim, page 3 of Response, this action was barred by 11 USC § 362(c) on October 16, 1991, Petition page 27.

Respondent's Motion to Lift the Automatic Stay, as to Rosemary, dated August of 1991, was denied by the Bankruptcy Judge. The automatic stay was lifted as to

Rosemary, by Order of January 20, 1998. (No fraudulent conveyance count was ever filed). Respondents' First Amended Complaint paragraph 36 reads that Rosemary's bankruptcy prohibited Plaintiffs from adding her as a defendant in this action.

Respondents repeatedly claim that constructive trusts arose on the day(s) the insureds were "wronged," Response page 4; Conditional Cross-Petition, pages 3, 4, 5, 6, 7, 8, which claims, in every case, arose years before the commencement of Rosemary's bankruptcy case. 11 USC § 362(a)(1). Obviously, Respondents were trying to destroy Rosemary's prepetition right of survivorship in the 17.83 acres when suit was commenced on October 16, 1991. Even Respondents understood that the suit was barred, but they filed it anyway.

Argument 6. The decision of the 6th Circuit conflicts with decisions of the other Circuit Courts.

Respondents, page 1 of Response, say the decision does not conflict with decisions of other Circuit Courts, but they do not cite any other Circuit Court decision which purports to destroy the survivorship rights of both the debtor and his or her spouse, nor do they cite any other court decision which holds that entireties properties are divided into moieties where one spouse files a Chapter 7 Petition and claims the "state-law" exemptions.

CONCLUSION

The exemptions available under 11 U.S.C. § 522(b)(2)(B) cannot be ignored to permit such an incompetent insurer to avoid its liabilities.

/s/_____
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DATED: February 28, 2001